SUPREME COURT U S

Office-Supreme Court, U.S.
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JOHN F. DAVIS

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, ET AL.,
Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 17, 1967
CERTIORARI GRANTED OCTOBER 9, 1967

Supreme Court of the United States

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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RELEVANT DOCKET ENTRIES

Trial Court

August 9, 1961.	Filed—Petition.
January 2, 1962.	Filed—Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number said Causes of Action.
March 2, 1962.	Filed—Journal Entry of Order of Court Overruling Defendants' Motion.
March 2, 1962.	Filed—Notice to the United States and its Various Agencies Named Below of the Pendency of the Above Action.
March 15, 1962.	Filed—Defendants' Amended Answer Containing Demurrer.
May 31, 1963.	Filed—Plaintiffs' Reply.
June 11, 1963.	Filed—Motion to Strike from Reply.
July 12, 1963.	Filed—Journal Entry of Order on July 1, 1963, Sustaining Demurrer and Allowing Time to Amend.
July 19, 1963.	Filed—Amended Petition.
August 5, 1963.	Filed—Motion to Strike from Amended Petition, Demurrer and Objection to Venue.
September 25, 1963.	Filed—Journal Entry of Order Sustaining Demurrer and Judgment Dismissing Cause on September 20, 1963, Showing Notice of Appeal Given in Open Court on September 20, 1963.

DOCKET ENTRIES (CONTINUED)

Supreme Court of Oklahoma

November 15, 1963.	Filed—Petition in Error with Case Made Attached.
March 23, 1964.	Filed—Motion of Defendant in Error to Dismiss Appeal.
July 7, 1964.	Filed—Opinion—Journal Entry—Motion Denied—Berry, J.
May 24, 1966.	Filed—Opinion—Affirmed—Per Curiam.
June 7, 1966.	Filed—Order Granting to June 23, 1966, to File Petition for Rehearing.
June 17, 1966.	Filed—Application for Extension of Time to File Petition for Rehearing.
June 21, 1966.	Filed—Order Granting to July 8, to File Petition for Rehearing.
July 5, 1966.	Filed—Petition for Rehearing.
December 20, 1966.	Filed—Journal Entry of Order Denying Petition for Rehearing.
February 1, 1967.	Filed—Motion to Stay Mandate, and Order Staying Mandate.
February 1, 1967.	Filed—Notice of Appeal to United States Supreme Court for Writ of Certiorari.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

PETITION

Come now the Plaintiffs, and for cause of action against the Defendant, alleges and states:

1. That the Defendant, Skelly Oil Company, is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Oklahoma and it maintains its principal office and place of business in Tulsa, Oklahoma; the service agent of Defendant is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

2. The Plaintiffs are now and have been at all times hereinafter mentioned, the owners of a trust patent to the surface and all oil, gas and other minerals and mineral rights thereunder, and in possession of the following described real property situated in Stephens County, State of Oklahoma, to wit:

> The Southeast quarter of Section Three in Township Two North of Range Eight West of the Indian Meridian, containing 160 acres.

That said lands are being held in trust by the United States Government, under the General Allotment Act of February 8, 1887, as amended, and said lands are under the jurisdiction and control of the Secretary of the Interior of the Department of Interior acting by and through the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, and the Commissioner of Indian Affairs.

3. That on May 28, 1947, the Plaintiffs, Frank Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, and John T. Montgomery, Superintendent, Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor, (now of age), as Lessors, made, executed and delivered to Skelly Oil Company, as Lessee, a Departmental oil and gas lease covering the above described tract. That on June 27, 1947,

said oil and gas lease was approved by J. W. Hutchison, Acting Commissioner of Indian Affairs of the United States Department of Interior. That said Skelly Oil Company also executed said oil and gas mining lease. A true and correct copy of said lease with all the endorsements thereon is hereto attached Marked Exhibit "A" and made a part hereof for all purposes. That the primary term of said lease was for a period of ten years, from the approval date of the Secretary of Interior, which period expired on June 27, 1957, and contained a provision that said lease would remain in full force and effect as much longer thereafter as oil and gas was produced in paying quantities from said land.

4. That during the year of 1956 Skelly Oil Company drilled seven oil and gas producing wells on said lands on 20-acre spacing, all of which wells have been dually completed. That shortly after said wells had been completed as commercial producers for oil and gas purposes upon said lands, demand was made by the Plaintiffs hereon on Skelly Oil Company to market the gas being produced and flared from said wells, there being a gas line operated by Lone Star Gas Company within one-half mile of said lands. That said Defendant failed and refused to market said gas and in addition thereto failed and refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That Defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has committed waste in the premises in direct violation of the express terms, conditions and covenants of the aforesaid oil and gas mining lease attached hereto as Exhibit "A", and in violation of the Conservation Statutes of the State of Oklahoma, Title 52 OSA Sec. 86.3.

5. That as a direct and proximate result of the aforesaid wrongful and illegal conduct of Defendant, Plaintiffs have been damaged in the loss of royalty, resulting from the waste occasioned by the wrongful and illegal oper-

ations of said written oil and gas mining lease (Exhibit "A" hereto) in the amount of One Hundred Fourteen Thousand Dollars ($114,000.00). That all of such damages are the direct and proximate result of the breach of said written agreement and covenant as aforesaid, as of this date.

Plaintiffs reserve the right to amend, at the date of trial hereof, and to set forth any additional damages which may have resulted in any continuous damages in the premises.

WHEREFORE, premises considered, Plaintiffs pray for judgment against Defendant in the amount of One Hundred Fourteen Thousand Dollars ($114,000.00), with interest and costs, and for such additional amount of damages which may have accrued at the date of trial, and for such other relief as Plaintiffs may be entitled to have as by law provided. Attorneys lien reserved.

/s/ HOUSTON BUS HILL

HOUSTON BUS HILL
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma

/s/ CHARLES HILL JOHNS

CHARLES HILL JOHNS
Cravens Building
Oklahoma City 2, Oklahoma

ATTORNEYS FOR PLAINTIFFS

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA, SS:

Carl Poafpybitty, of lawful age, being first duly sworn, upon oath deposes and says: That he is one of the Plaintiffs herein named; that he has read the above and foregoing Petition, knows the contents thereof, and that the same are true and correct.

/s/ Carl Poafpybitty

Carl Poafpybitty

Subscribed and sworn to before me, this 12th day of July, 1961.

(SEAL)

/s/ Theodora E. Devlin
Notary Public

My Commission Expires: 10-19-63.

ENDORSED:

FILED IN DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG. 9 1961
DALE SMITH, COURT CLERK
By W. H. REGIAN, Deputy

Form 5-151 b
(September 1942)

Tr. 167

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS I-51-Ind-43310

OIL AND GAS MINING LEASE—ALLOTTED INDIAN LANDS

LESSEE'S COPY

COMANCHE TRIBE, STATE OF OKLAHOMA

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 28th day of May 1947, 19__, by and between Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, adults born in 1914, 1916, 1919, and 1921, respectively, and John T. Montgomery, Supt. Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor male born in 1928, heirs of Eh-toh-wed-di (Probate 13207-34),

of Kiowa Indian Agency, State of Oklahoma, allottee No. 2660

(roll No. _____), of the Comanche Tribe of Indians, designated herein as

lessor, and Skelly Oil Company

Box 1650

of Tulsa 2, State of Oklahoma, herein designated as

lessee:

23353-7

WITNESSETH

1. Lessor, in consideration of a cash bonus of $ 2860.60 paid to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, receipt of which is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Stephens State of Oklahoma, and more particularly described as follows:

The Southeast quarter of Section Three in Township Two North of Range Eight West of the Indian Meridian,

RECEIVED

containing 160 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(b) Wells.—(1) To drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage: *Provided*, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior; (2) at the election of the lessee to drill and produce other wells: *Provided*, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (3) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified.

(1)

16—47884-4

"Exhibit A"

(c) **Rental and royalty.**—To pay, beginning with the date of approval of the lease by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided*, That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further*, That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in sections 8 (a) and 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(d) **Monthly statements.**—To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

(e) **Log of well.**—To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lessee showing the strata and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.

(f) **Diligence, prevention of waste.**—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(g) **Regulations.**—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: *Provided*, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.

(h) **Assignment of lease.**—Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

4. The lessor expressly reserves:

(a) **Disposition of surface.**—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lessee herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.

(b) **Use of gas.**—The right to use sufficient gas free of charge for all stoves and inside lights in the principal dwelling house on said lands by making connection at his own expense with the well or wells thereon, the use of such gas to be at the lessor's risk at all times.

(c) **Royalty in kind.**—The right to elect on 30 days' written notice to take lessor's royalty in kind.

5. **Surrender and termination.**—The lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of the sum of one dollar and all rentals, royalties, and other obligations due and payable to the lessor; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lessee shall file a recorded release with his application to the superintendent for termination of this lease.

6. **Cancelation and forfeiture.**—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided*, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.

7. **Removal of buildings, improvements, and equipment.**—Lessee shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material, and/or equipment placed thereon for the purpose of development and operation hereunder, save and except casing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all casing in wells, material, structures, and equipment shall be and become the property of the lessor.

8. **Relinquishment of supervision by the Secretary of the Interior.**—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as provided in section 3 (c). After notice of relinquishment has been received by lessee, as herein provided, this lease shall be subject to the following further conditions:

(a) All rentals and royalties thereafter accruing shall be paid in the following manner: Rentals and royalties shall be paid directly to lessor or his successors in title, or to a trustee appointed under the provisions of section 9 hereof.

(b) If, at the time supervision is relinquished by the Secretary of the Interior, lessee shall have made all payments then due hereunder, and shall have fully performed all obligations on its part to be performed up to the time of such relinquishment, then the bond given to secure the performance hereof, on file in the Indian Office, shall be of no further force or effect.

(c) Should such relinquishment affect only part of the acreage, then lessee may continue to drill and operate the land covered hereby as an entirety: *Provided*, That lessee shall pay in the manner prescribed by section 3 (c), for the benefit of lessor such proportion of all rentals and royalties due hereunder as the acreage retained under the supervision of the Secretary of the Interior bears to the entire acreage of the lease, the remainder of such rentals and royalties to be paid directly to lessor or his successors in title or said trustee as the case may be, as provided in subdivision (a) of this section.

9. **Division of fee.**—It is covenanted and agreed that should the fee of said land be divided into separate parcels, held by different owners, or should the rental or royalty interests hereunder be so divided in ownership, after the execution of this lease and after the Secretary of the Interior relinquishes supervision hereof, the obligations of lessee hereunder shall not be added to or changed in any manner whatsoever save as specifically provided by the terms of this lease. Notwithstanding such separate ownership, lessee may continue to drill and operate said premises as an entirety: *Provided*, That each separate owner shall receive such proportion of all rentals and royalties accruing after the vesting of his title as the acreage of the fee, or rental or royalty interest, bears to the entire acreage covered by the lease; or to the entire rental and royalty interest as the case may be: *Provided further*, That if, at any time after departmental supervision hereof is relinquished, in whole or in part, there shall be four or more parties entitled to rentals or royalties hereunder, whether said parties are so entitled by virtue of undivided interests or by virtue of ownership of separate parcels of the land covered hereby, lessee, at his election may withhold the payment of further rentals or royalties (except as to the portion due the Indian lessor while under restriction), until all of said parties shall agree upon and designate in writing and in a recordable instrument a trustee to receive all payments due hereunder on behalf of said parties and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole risk of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title.

10. **Drilling and producing restrictions.**—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

11. **Unit operation.**—The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

12. **Helium—public emergency.**—It is covenanted and agreed that helium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing helium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the option to purchase all or any part of the products produced under this lease.

13. **Conservation.**—The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.

14. **Heirs and successors in interest.**—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Two witnesses to execution by lessor:

Ruth Hunt

P. O. [illegible]

Ethel A. Bitsa

P. O. [illegible]

RECEIVED JUN 1 3 1947 KIOWA AGENCY

[illegible] [SEAL]

[illegible] [SEAL]

[illegible]

Supt. Kiowa Indian Agency, for and on behalf of minor mentioned in face of this instrument.

Two witnesses to execution by lessee:

Robt T. Buchanan

P. O. Tulsa, Oklahoma

John Reidy Jr.

P. O. Tulsa, Oklahoma

SKELLY OIL COMPANY [SEAL]

By _____
Vice President

Attest: _____
Assistant Secretary

STATE OF Okla. }
COUNTY OF Caddo } ss.:

Before me, a notary public, on this 2nd day of June 1947 19__, personally appeared Frank Poafybitty, Carl Poafybitty, Thompson Poafybitty, Louise Poafybitty, and John T. Montgomery, Supt. Kiowa Indian Agency, for and on behalf of Laverne Aitson, a male minor,

to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires June 30, 1948

Fred R. Nichols, Notary Public.

UNITED STATES
DEPARTMENT OF THE INTERIOR

Chicago, Ill. JUN 27 1947 19__

The within lease is hereby approved.

(Sgd.) J. W. HUTCHISON
Acting Commissioner of Indian Affairs.

Filed for record this _____ day of _____, 19__, at _____ o'clock ___m.

By _____

Rental received, $_____

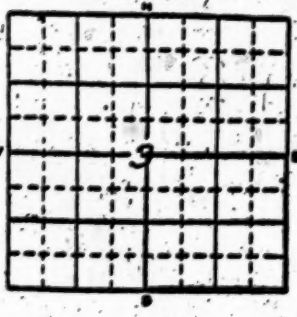
U. S. GOVERNMENT PRINTING OFFICE 16—17202-4

Form 9-1196

KIOWA

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
LEASE REPORT

Lease No. 43810



S. 3 T. 2 S. R. 8 W. Lease appr. 8-27-47

Allottee Mih-rah-wad-di, Comanche 2660

Lessee Shelly Oil Company

Operator Shelly Oil Company

Field Marlow District

Total number wells drilled 5 (No. 6 drilling)

AVERAGE DAILY LEASE PRODUCTION			
Oil (bbl.)	Water (bbl.)	Dry gas (cu. ft.)	C. H. gas (cu. ft.)
295	None	None	Vented - not measured

Is oil or gas used on lease? No On adjacent leases? No

Consignee: Oil Rock Island Oil & Ref. Dry gas --- C. H. gas ---

Number, type, and size of stock tanks 3 - 500 bbl. - steel bolted. 3260, 3261 and 3867. 3 - 500 bbl. with no numbers.

Regulations complied with: 2a. Y 2c. Y 2d. X 2e. See Remarks 2f. Y 2e. Y 2q. Y 2r. See Remarks 2s. X 2w. Y

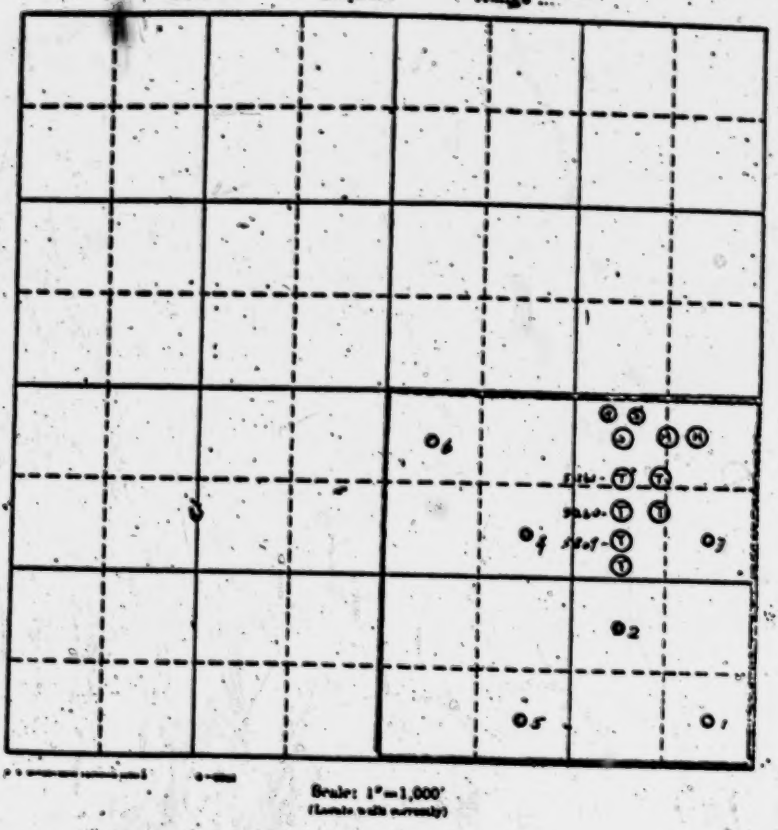
Well No.	Oil, gas, dry, water	Flowing, pumping, gas lift, gas, or water or nothing	Number of tubing, casing, or none	If shot, date	PRESENT PRODUCTION: Casing pressure	Daily average oil or gas production	Daily average amount of water produced	PRODUCTIVE ZONES: Formation	Top of producing formation	Bottom of producing formation	Plugged back depth
1	Oil	F	Dual Compl.		550	27	0	L. Heath	6070	6090	
1	Oil	F				33	0	U. Griffin	6624	6634	8730
2	Oil	F	Dual Compl.		No Gage	33	0	U. Griffin	6556	6564	8735
2	Gas	S.I.				I.P. 3000 MCF/D	0	L-Cleo	7053	7075	
3	Oil	F	Dual Compl.		1700	33	0	U. Griffin	6666	6675	8760
3	Oil	F				37	0	Miss (Lime)	7479	7491	PB 8750
4	Oil	F	Dual Compl.		1900	33	0	Cregory	6612	6630	7505
4	Oil	F				37	0	Miss	7448	7458	
5	Oil	F	Dual Compl.		1200	33	0	Griffin	6536	6555	7520
5	Oil	F				37	0	Reed	7251	7264	

Nov. 2, 1957

M. M. Shuster

REMARKS: Wells all flowing. Lease clean up was very good. No coal or zone signs on Well No. 5. Considerable gas blowing to air from four vents north of tanks. Company reports no market for this gas. Lone Star Gas Company may lay a gathering line.

Sec. 3 Twp. 2 N. Range 8 W.



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PAGE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

* * * * * *

MOTION TO REQUIRE PLAINTIFFS TO ELECT AS BETWEEN TWO SEPARATE CAUSES OF ACTION AND IN THE ALTERNATIVE TO SEPARATELY STATE AND NUMBER SAID CAUSES OF ACTION

Comes now the defendant and leave of court first obtained:

1. Moves the Court to require plaintiffs to elect whether they will proceed herein upon

(a) The asserted cause of action upon contract to market and pay royalty upon casinghead gas emitted from said wells, or

(b) The asserted cause of action in tort for alleged wrongful flaring and alleged wasting of said casinghead gas.

2. In the alternative and if the above and foregoing Motion be denied, this defendant moves the Court to require plaintiffs to separately state and number the separate causes of action above described which are commixed and commingled in plaintiffs' Petition herein.

Respectfully submitted,

SKELLY OIL COMPANY, a corporation

By /s/ S. W. Wells

S. W. Wells
P. O. Box 1650
Tulsa, Oklahoma

By /s/ John H. Cantrell

John H. Cantrell
2120 First National Building
Oklahoma City, Oklahoma

Attorneys for Defendant

CERTIFICATE OF SERVICE

Copies mailed to the attorneys of record for plaintiffs this 2nd day of January, 1962.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Jan 2 1:46 PM '62
DALE SMITH, COURT CLERK
BY RON HOWLAND

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

JOURNAL ENTRY

Now on this 2nd day of March, 1962, there coming on to be heard the Motion of the defendant to require plaintiffs to elect as between two separate causes of action or in the alternative to separately state and number said causes of action, and upon agreement of the parties and for good cause shown,

IT IS HEREBY ORDERED as follows:

1. The following language: "and in violation of the Conservation Statutes of the State of Oklahoma, Title 52 O.S.A. Sec. 86.3.", as same appears in the final sentence of numerical paragraph 4 of said Petition, be and the same is hereby stricken from the Petition of the plaintiffs herein;

2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition and that only recovery in contract will be sought in this action by

plaintiffs, the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative Motion of said defendant to require separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason; and

3. Defendant's application for leave to file an Amended Answer in this cause within fifteen (15) days from this date is hereby granted with plaintiffs to have ten (10) days thereafter within which to file their Reply thereto.

/s/ A. P. VAN METER
DISTRICT JUDGE

O.K. /s/ Charles Hill Johns
/s/ Houston Bus Hill, Attorneys for Plaintiffs

O.K. /s/ John H. Cantrell
/s/ S. W. Wells, Attorneys for Defendant.

ENDORSED: FILED, DISTRICT COURT, OKLAHOMA COUNTY, OKLA. Mar 2 9:48 AM '62. DALE SMITH, COURT CLERK By Dan Gray

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

NOTICE TO THE UNITED STATES AND ITS VARIOUS AGENCIES NAMED BELOW OF THE PENDENCY OF THE ABOVE ACTION

TO: United States of America,
Department of the Interior
Washington, D. C.

Secretary of the Interior,
United States of America,
Washington, D. C.

Commissioner of Indian Affairs,
United States of America,
Washington, D. C.

Superintendent, Kiowa Indian Agency,
Anadarko, Oklahoma

Area Director of the Bureau of Indian Affairs,
Anadarko, Oklahoma

Area Field Representative Kiowa Indian Agency,
Anadarko, Oklahoma

Andrew F. Potter,
Oklahoma City, Oklahoma

Gentlemen:

You and each of you are hereby notified that on the 9th day of August, 1961, the above styled and numbered cause was instituted in the District Court of Oklahoma County, Oklahoma, by the plaintiffs above named, by their counsel of record, Houston Bus Hill and Charles Hills Johns, Attorneys of Oklahoma City, Oklahoma, against the defendant above named, Skelly Oil Company, a corporation, and Summons was thereafter duly served upon said defendant.

Said action is now pending but is not at issue and is yet not set for trial. A copy of the Petition of the plaintiffs in said cause, a copy of defendant's Motion to Make More Definite and Certain and Demurrer Thereto, a copy of defendant's present Answer to plaintiffs' Petition, a copy of plaintiff's Reply to said Answer, and a copy of defendant's pending Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number said Causes of Action is attached hereto for your information.

Briefly stated, said plaintiffs, lessors in a departmental lease (dated May 28, 1947) of allotted Indian lands (Comanche Allottee 2660) being the Southeast Quarter (SE¼) of Section Three (Sec. 3), Township Two North (T 2 N), Range Eight West (R 8 W), Stephens County, Oklahoma (your lease number 1-51-Ind-43810) are suing defendant to recover royalties and/or damages for casinghead gas allegedly "flared" by defendant in the course of its operations of said lease. The suit seeks to recover the stated amount of $114,000.

It is thought that these restricted Indians have no proper right or standing to maintain and prosecute this action and you are hereby given notice of the pendency of such suit and said contention of this defendant and you will govern yourselves accordingly.

It will be appreciated if you will advise us of your decision as to whether you will take any action and if so, what, as soon as the decision has been made.

Respectfully,

SKELLY OIL COMPANY

By /s/ S. W. Wells

S. W. Wells,
Skelly Oil Company,
P. O. Box 1650,
Tulsa 2, Oklahoma

By /s/ John H. Cantrell

John H. Cantrell,
2120 First National Building
Oklahoma City 2, Oklahoma

Attorneys for Skelly Oil Company in said cause.

AFFIDAVIT OF MAILING

I, S. W. WELLS, one of the attorneys for the defendant in the case of "Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, Plaintiffs, vs. Skelly Oil Company, a corporation, Defendant, No. 154,040 in the District Court of Oklahoma County, State of Oklahoma," hereby certify that on the 28th day of February, 1962, I served the attached "Notice to the United States and Its Various Agencies of the Pendency of the Above Action" and the following instruments: a copy of Plaintiffs' Petition in said cause; copy of defendant's Motion to Make More Definite and Certain and Demurrer Thereto; copy of defendant's present Answer to Plaintiffs' Petition; copy of plaintiffs' Reply to said Answer; and a copy of defendant's pending Motion to Require Plaintiffs to Elect as Between Two Separate Causes of Action and in the Alternative to Separately State and Number Said Causes of Action; on:

United States of America,
Department of the Interior,
Washington, D. C.

Secretary of the Interior,
United States of America,
Washington, D. C.

Commissioner of Indian Affairs,
United States of America,
Washington, D. C.

Superintendent Kiowa Indian Agency
Anadarko, Oklahoma

Area Director of the Bureau of Indian Affairs,
Anadarko, Oklahoma

Area Field Representative Kiowa Indian Agency
Anadarko, Oklahoma

Andrew F. Potter
United States District Attorney,
Oklahoma City, Oklahoma

by depositing copies of each, addressed as shown above, in the United States Registered Mails, postage prepaid, return receipt requested.

/s/ S. W. Wells

S. W. Wells

CERTIFICATE OF SERVICE UPON COUNSEL

Copies of the above Notice served upon counsel of record herein for the plaintiffs above named on the 2nd day of March, 1962, by mailing same in envelopes properly addressed to

1. Houston Bus Hill
   Attorney at Law
   Liberty Bank Bldg.,
   Oklahoma City, Oklahoma

and

2. Charles Hill Johns
   Attorney at Law
   Cravens Building
   Oklahoma City, Oklahoma

with postage fully prepaid.
Dated 3/2/62.

/s/ John H. Cantrell
Law Dept. Aug 10, 1961

[Exhibits Excluded]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

AMENDED ANSWER CONTAINING DEMURRER

DEMURRER

Comes now the defendant, Skelly Oil Company, a corporation, and demurs to the Petition of the plaintiffs herein as amended and for the several grounds thereof states:

1. Plaintiffs have no capacity to maintain this action;

2. Plaintiffs have no legal title to the chose in action sought to be asserted by them;

3. The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that plaintiffs are not the proper parties to institute and maintain this suit;

4. The said Petition shows on its face that plaintiffs cannot recover in this action;

5. Plaintiffs are not the real parties in interest within the intent, meaning and contemplation of the Oklahoma Statutes prescribing who may institute and maintain an action of this kind;

6. Said Petition shows on its face that conditions precedent to recovery upon the contract sued on have not been performed;

7. Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against the defendant; and

8. Said Petition shows on its face that the applicable statute of limitation as contained in 12 O.S.A. Section 95 bars recovery by plaintiffs.

Amended Answer

For its Amended Answer to Plaintiffs' Petition as amended defendant alleges and states:

1. Defendant incorporates in this Answer the same as if repeated and set out in full herein each, every and all of the statements hereinabove contained in the Demurrer of this defendant;

2. Defendant denies each and every material allegation in plaintiffs' Petition except such as may be hereinafter expressly admitted;

3. Defendant admits the allegations of paragraph 1 of plaintiffs' Petition;

4. Defendant admits that the plaintiffs are owners of the surface and mineral rights thereunder of certain property as described in paragraph 2 of plaintiffs' Petition. Defendant also admits that under applicable and controlling law plaintiffs are restricted Indians, wards of the government of the United States and that the United States of America, acting by and through the Secretary of the Interior and the designated officers, agents, subordinates and supervisors, has and has had exclusive control of Lessors' interest in and under said Lease and the real estate described therein, and otherwise also as stated in the said Lease, copy of which is attached to the Petition of the plaintiffs herein;

5. Defendant admits the allegations of paragraph 3 of the Petition and that it is the owner of the oil and gas lease referred to therein. In this connection, the defendant alleges that said lease is valid, subsisting, and has been maintained in force and effect by production of oil and/or gas from the leased premises in paying quantities and the payment of royalties thereon since the completion of the first well thereon during the year 1956;

6. Defendant admits that it has drilled seven (7) producing oil and gas wells on the lands in question and that

the first of said wells was completed during the year 1956, but specifically denies all other allegations contained in paragraph 4 of the petition;

7. Defendant has operated under said lease in accordance with the terms thereof without objection upon the part of the aforesaid authorized agents and officers of the United States of America and with their consent and express and tacit approval and with full knowledge upon the part of said agents and officers as well as of the plaintiffs herein, and without demand or requirement for change thereof or therein, and in which operations said United States and said agents and officers as well as said plaintiffs have fully concurred and acquiesced, and which operations by defendant and the benefits thereof said parties and each of them have elected to accept, approve and receive;

8. Under the compulsion of the covenants and commitments of said lease, express and implied, and under the authority of the said agents and officers and thus of the United States as aforesaid this defendant has continuously produced oil under said lease and has accounted for and paid the royalty due thereon including royalty upon any and all gas produced, saved, marketed or used off the premises and/or not used in the reasonable, necessary and said approved manner by defendant in the operation of said lease and lease hold;

9. For all oil, gas and hydrocarbons produced from the wells on said lease as to which royalty was and is payable under the terms of said lease, this defendant has truly accounted, by monthly statements in writing, as required by said lease, and the royalty shown thereon by it to be payable has been duly paid to and accepted, received and retained by the ones entitled thereto with full knowledge of the pertinent facts without objection or refusal and without demand that defendant change or alter its mode of operations. Said monthly written statements have been accepted as correct, and at no time has either

the United States, or its said designated agents, supervisors or officers or any or all of plaintiffs elected or sought to elect to take and receive in kind any oil, gas or hydrocarbons produced from said wells, or either or all of them, as the royalty payable under said lease for any such production. By virtue of the above and foregoing facts there has been a complete, sufficient and acequate waiver upon the part of the United States and its said wards, the plaintiffs, of any right to a different method or manner of operations than those carried on by defendant any of any right of additional royalties more than those so reported and paid and of any right to any damages on account of said operations. In this connection and because of the above recited facts and the acceptance and retention of the benefits thereof by plaintiffs, their said guardian and said officers and agents and by their laches, defendant asserts that the plaintiffs, and separately their said guardian, its agents and officers sanctioned the operations on said lease property and are each and all estopped to deny that any gas used by this defendant on the lease and in the course of its operations was and is "royalty free"; and separately are estopped to deny that any gas unavoidably lost was and is "royalty free";

10. At all times defendant acted in a reasonable and prudent manner and as a reasonable and prudent oil and gas operator in seeking a market upon fair and just terms for all oil, gas and hydrocarbons produced and to be lawfully produced on said lease and from said wells and for any such time as any such product was not marketed this defendant was unable to find and establish such a reasonable, fair and just market therefor. During any such time as any of the aforementioned products were not marketed, the defendant diligently pursued and endeavored to secure a market for the products which was reasonable, fair and to the best interests of all concerned and has not succeeded in so doing; and

11. The applicable statutes of limitation as contained in 12 O.S.A. Section 95 bar any recovery by plaintiffs in

this action. In this connection defendant says that there can be no recovery of any amount or amounts accruing more than five, three and two years respectively preceding the filing of this action.

WHEREFORE having fully answered, defendant asks that this cause be dismissed, and that defendant be discharged with its costs.

SKELLY OIL COMPANY, a corporation

By /s/ S. W. Wells

S. W. Wells
P. O. Box 1650
Tulsa 2, Oklahoma

/s/ John H. Cantrell

John H. Cantrell

/s/ CANTRELL, DOUGLASS, THOMPSON & WILSON

CANTRELL, DOUGLASS, THOMPSON & WILSON
2120 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 15th day of March, 1962, I served the above and foregoing Amended Answer Containing Demurrer in the above case upon the plaintiffs in said cause by mailing to counsel of record for said plaintiffs in said cause, in envelopes properly addressed and with postage thereon fully prepaid, true and correct copies of said "Amended Answer Containing Demurrer" as follows to-wit:

Houston Bus Hill
Attorney at Law
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma
and

Charles Hills Johns
Attorney at Law
Cravens Building
Oklahoma City 2, Oklahoma

Dated this 15th day of March, 1962.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Mar 15 12:50 PM '62

DALE SMITH, COURT CLERK

BY DAN GRAY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

REPLY

COME NOW plaintiffs and for reply to the amended answer of defendant, allege and state:

1. Plaintiffs deny each and every material allegation of new matter pleaded in the amended answer of defendant.

2. Plaintiffs allege and show to this Honorable Court that the United States of America has authorized the institution of this action and has consented to plaintiffs proceeding herein against defendant, all as is set forth in a certain contract and power of attorney executed and approved by the United States of America, a copy of which is hereto attached marked Exhibit "A" and made a part hereof.

WHEREFORE, plaintiffs pray that upon a trial hereof they have judgment as prayed for in their petition.

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ Charles Hill Johns
CHARLES HILL JOHNS

Attorneys for Plaintiffs

A copy of the within and foregoing reply was mailed to Mr. John H. Cantrell, Attorney at Law, 2120 First National Building, Oklahoma City 2, Oklahoma, Attorney for defendant herein, this 31st day of May, 1963.

/s/ Charles Hill Johns

EXHIBIT "A"

CONTRACT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned, FRANK POAFPYBITTY, THOMPSON POAFPYBITTY, CARL POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON, Comanche Indians of Southwestern Oklahoma, have made, constituted, and appointed, and by these presents do make, constitute, and appoint HOUSTON BUS HILL, Attorney at 1412 Liberty Bank Building, Oklahoma City 2, Oklahoma, our true and lawful attorney for each of us, and in our name, place, and stead, and for each of us, to represent each of us in connection with the claim for damages against the Skelly Oil Company, which Company has been flaring and wasting gas from an oil and gas lease and Leasehold estate described as

SE4 Section 3, T-2-N, R-3-W, Stephens County, Oklahoma, since approximately 1956.

That the Skelly Oil Company has been operating the above described oil and gas lease and leasehold estate upon which there are seven wells, six of which have been duly

completed and one singly completed on 20-acre spacing. That repeated demands were made upon Skelly Oil Company to market said gas in order that the above owners would receive their proportionate part of the gas being flared and wasted, *by* Skelly Oil Company refused to do so to the damage of the undersigned owners. That we are unable to determine the amount and extent to which we have been damaged as a result of the waste and flaring of the gas from said leasehold estate and you have been working with us on this matter since April, 1960. We desire to have a suit instituted against Skelly Oil Company for the purpose of recovering any damage to which we are entitled and prosecute the same to a final conclusion. In this connection, we will probably need the service of a Petroleum Engineer and your compensation will be sufficient to take care of him.

You, Houston Bus Hill, are hereby authorized as our true and lawful attorney for each of us and in our name, and stead, and each of us hereby give you the full power to do everything whatsoever necessary and requisite to be done to institute suit against Skelly Oil Company and recover any damages to which we are entitled to our proportionate part as a result of the flaring and wasting of the gas and other hydrocarbons from the above described oil and gas lease and leasehold estate which we own, as fully as if each of us could do if personally present, with full power of substitution and revocation and further authorize you to appear before the Area Office of the Bureau of Indian Affairs at Anadarko, Oklahoma, the Department of Interior, the U.S.G.S., the Secretary of Interior, any of the State Courts, or the Supreme Court of the State of Oklahoma, the United States District Courts, and the United States Circuit Court of Appeals, for the purpose of prosecuting our claim as hereinabove set forth against Skelly Oil Company with full authority to negotiate, confer with all government agencies or representatives of the Bureau of Indian Affairs, the Area Office, and the Secretary of Interior, and obtain any information, files, or records pertinent to our claims.

In consideration of the services which you have rendered and which you are going to render in connection with the foregoing, we, the undersigned, Frank Poafpybitty, Irene Poafpybitty, Thompson Poafpybitty, Carl Poafpybitty, Louise Poafpybitty, and LaVerne Aitson, agree that if you are successful in recovering damages in the form of money in connection with the prosecution of our claim against the Skelly Oil Company, for gas and other hydrocarbons flared and wasted from our oil and gas lease and leasehold estate above described, since 1956, down to date to which we are entitled as royalty owners and/or lessors, we, and each of us, hereby agree to pay and have assigned over to you 40% of any sums of money should you be successful in recovering same for us through negotiations without the necessity of a law suit. Should it be necessary for you to file a damage suit against Skelly Oil Company either in the State Court or the United States District Court and you are successful in the prosecution thereof in recovering damages in the form of money for us, then we, and each of us, hereby agree to pay and have assigned over to you 50% of any sums of money so recovered for us. That should you have to prosecute our claim before the Supreme Court of the State of Oklahoma or before the Circuit Court of Appeals, then you agree to prosecute same on the basis of 50% being paid to you of whatever sums of money you are successful in recovering for us.

It is specifically understood and agreed that we will pay the Court costs and the printing of any Briefs in connection with the prosecution of our claim; and it is further understood that you are to take care of the Petroleum Engineer and any other expert assistance which you may need in the prosecution of this action.

It is further understood that if you are unsuccessful in your efforts to recover any money or damages arising out of our claim against Skelly Oil Company for flaring and wasting gas and other hydrocarbons from the above de-

scribed oil and gas lease and leasehold estate then you will receive no compensation for your services.

It is further understood that any money which you may recover for us will be paid in accordance with the directions of the Area Office of the Bureau of Indian Affairs at Anadarko, Oklahoma. Should the money be required to be paid into the Area Office, then that office will pay your fee for services rendered pursuant to this Contract and Power of Attorney and the remainder of said money, if any, will be disbursed to the undersigned in proportion to their interest in said oil and gas lease and leasehold estate.

You agree to faithfully, diligently, and carefully prosecute this claim for damages against the Skelly Oil Company to a conclusion on behalf of the undersigned parties, and if necessary, to take the same to the Supreme Court of the State of Oklahoma or the Circuit Court of Appeals. You are to stand all responsibility for the Petroleum Engineer services or any other expert services required in the prosecution of this action. You will not compromise or settle our claim without first obtaining the approval of the undersigned parties.

If the foregoing meets with your approval, you will please accept the same at the place hereinafter designated.

IN WITNESS WHEREOF, each of us have hereunto set our hand, this 24th day of January, 1961.

/s/ Frank Poafpybitty

Frank Poafpybitty

Thompson Poafpybitty

Thompson Poafpybitty

/s/ Carl Poafpybitty

Carl Poafpybitty

/s/ Louise Poafpybitty

Louise Poafpybitty

LaVerne Aitson

LaVerne Aitson

The above and foregoing employment and power of attorney is accepted by the undersigned, Houston Bus Hill, this 24th day of January, 1961.

/s/ Houston Bus Hill

Houston Bus Hill
1412 Liberty Bank Bldg.
Oklahoma City 2, Oklahoma

The above and foregoing Contract is hereby approved by the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, this ..... day of February, 1961.

Will J. Pitner

DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ANADARKO AREA OFFICE

Anadarko, Oklahoma

Apr 6 - 1962

The foregoing contract between Frank Poafpybitty, Thompson Poafpybitty, Carl Poafpybitty, Louise Poafpybitty, and Laverne Aitson, and Houston Bus Hill, Oklahoma City, Oklahoma, for legal services in connection with a suit against Skelly Oil Company to recover damages for the wasting of natural gas from an approved oil and gas lease covering allotted Comanche lands in Stephens County, Oklahoma, is approved pursuant to authority contained in section 269 of Order Number 551 of the Commissioner of Indian Affairs (16 F.R. 2939, as amended), subject to the condition that:

The payment of compensation to the attorney shall be made upon a quantum meruit basis, after the legal services have been performed, in an amount to be determined after statement of services rendered has been submitted by the attorney, and shall be wholly contingent upon a recovery for the plaintiffs and the availability of funds.

/s/ Will J. Pitner
Area Director

The above conditions are hereby accepted:

Mr. Houston Bus Hill, Attorney at Law.

/s/ Houston Bus Hill

Leave granted to file May 31, 1963

s/s A. P. VAN METER,
JUDGE

ENDORSED: FILED, DISTRICT COURT, OKLAHOMA COUNTY, OKLA. May 31, 1:46 PM '63. DALE SMITH, COURT CLER, By C. Huddleston

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STRIKE FROM REPLY

Without waiving in anywise or to any extent its pending Demurrer to plaintiffs' Petition which said Demurrer is now being considered by the Court upon written Briefs,

The defendant, Skelly Oil Company, moves the Court severally to strike from plaintiffs' Reply recently filed herein: (1) All of paragraph numbered 2 thereof, (2) Exhibit A attached to such Reply, and (3) The letter of Will Pitner, Area Director, following and attached to said Exhibit A for each of the following reasons:

1. Said paragraph 2 contains allegations and references to extraneous matter which are wholly irrelevant, redundant, immaterial and constituting neither proper assertions nor defense against matters alleged in the Answer of this defendant or against said pending Demurrer;

2. Said paragraph, if proper at all which is denied, has no place in a Reply and is redundant and a departure;

3. Said "contracts", represented by said Exhibit A is insufficient, nonmutual, conditional, illegal, unauthorized, unapproved and incomplete and has no legal effect to authorize the institution and maintenance of this action by the plaintiffs; and

4/ Said letter of Will Pitner is without legal effect to change the established law, the statutes of Oklahoma, the decisions of the Supreme Court of Oklahoma, the Federal statutes and the rules and regulations of the Secretary of Interior promulgated pursuant to law, or any of them.

Respectfully submitted,

/s/ S. W. Wells

S. W. Wells
Skelly Building
Tulsa, Oklahoma

/s/ John H. Cantrell

John H. Cantrell
2120 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

On this 11th day of June, 1963, I served the above and foregoing Motion upon the plaintiffs in the above styled and numbered cause by mailing in envelopes properly addressed with postage prepaid, true and correct copies of said Motion to:

Chas. Hill Johns, Attorney at Law
Cravens Building
Oklahoma City, Oklahoma

and

Houston Bus Hill, Attorney at Law
Liberty Bank Building
Oklahoma City, Oklahoma

Dated this 11th day of June, 1963.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jun 11 8:50 AM '63

DALE SMITH, COURT CLERK

BY E. C. Brett

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

ORDER SUSTAINING DEMURRER

Now on this 1st day of July, 1963 there comes on for further hearing and decision upon the Demurrer of the Defendant, Skelly Oil Company, contained in its Amended Answer herein. The Plaintiffs appear by their attorney of record, Charles Hill Johns, and the Defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that after reading and fully considering the Briefs submitted to the Court by the parties the Court has concluded that the said Demurrer of said Defendant should be sustained. The Court therefore

finds and orders that said Demurrer be sustained, whereupon the Plaintiffs except and exceptions are allowed. The Plaintiffs then pray the Court for leave to file an Amended Petition herein within twenty (20) days from this date. Defendant objects to the granting of such leave upon legal grounds stated to the Court. The Court finds that such leave to file an Amended Petition should be granted and that Defendants objection thereto should be overruled to which the Defendant excepts and exceptions are allowed. Defendant then requests the Court to fix the time for the Defendant to plead or answer after the date of the filing of said Amended Petition by Plaintiffs and such request is granted.

IT IS THEREFORE ORDERED that the Demurrer of the Defendant, Skelly Oil Company, as contained in its Amended Answer herein be, and the same is hereby sustained to which the Plaintiffs except and exceptions are allowed. Plaintiffs are granted twenty (20) days from this date within which to file their Amended Petition herein to which the Defendant excepts and exceptions are allowed. Defendant is granted twenty (20) days from and after the date of the filing of Plaintiffs' Amended Petition herein within which to plead to or answer said Amended Petition.

Dated this 1st day of July, 1963.

/a/ A. P. VAN METER
DISTRICT JUDGE

O.K. as to form:

/s/ Houston Bus Hill
/s/ Chas Hill Johns
Attorneys for Plaintiffs

/s/ S. W. Wells
/s/ John H. Cantrell
Attorneys for the Defendant

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jul 12 8:28 AM '63

DALE SMITH, COURT CLERK

By C. Huddleston

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

AMENDED PETITION

COME NOW plaintiffs and for cause of action in their amended petition against the defendant, allege and state:

1. Plaintiffs reallege all the allegations contained in their original petition, and further state.

2. That defendant Skelly Oil Company is a foreign corporation, organized and existing under and by virtue of the laws of the State of Delaware, and is authorized to do business in the State of Oklahoma, and it maintains its principal office and place of business in Tulsa, Oklahoma; that the service agent of the defendant is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

3. That plaintiffs are now and have been at all times hereinafter mentioned, the owners of a trust patent to the surface and all oil, gas and other minerals and mineral rights thereunder, and are in possession of the following described real property situated in Stephens County, State of Oklahoma, to wit:

> The Southeast Quarter of Section Three, in Township Two North of Range Eight West of the Indian Meridian, containing 160 acres.

That said lands are being held in trust by the United States Government, under the General Allotment Act of February 8, 1887, as amended, and said lands are under the jurisdiction and control of the Secretary of the Interior of the Department of Interior acting by and through the Area Director of the Bureau of Indian Affairs at Anadarko, Oklahoma, and the Commissioner of Indian Affairs.

4. That on May 28, 1947, the plaintiffs, Frank Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty, and John T. Montgomery, Superintendent of Kiowa Indian Agency, for and on behalf of Laverne Aitson, a minor (now of age), as Lessors, made, executed and delivered to Skelly Oil Company, as lessee, a Departmental oil and gas lease covering the above described tract; that on June 27, 1947, said oil and gas lease was approved by J. W. Hutchison, Acting Commissioner of Indian Affairs of the United States Department of Interior; that said Skelly Oil Company also executed said oil and gas mining lease, and that a true and correct copy of said lease, with all endorsements thereon, marked Exhibit "A", are attached to the original petition filed herein, and by reference hereto are made a part hereof for all purposes. That the primary term of said lease was for a period of ten years from the approval date of the Secretary of Interior, which period expired on June 27, 1957, and contained a provision that said lease would remain in full force and effect as much longer thereafter as oil and gas was produced in paying quantities from said land.

5. That during the year 1956, Skelly Oil Company drilled seven oil and gas producing wells on said lands on 20-acre spacing, all of which wells have been duly completed. That shortly after said wells had been completed as commercial producers for oil and gas purposes upon said lands, demand was made by plaintiffs herein on Skelly Oil Company to market the gas being produced and flared from said wells, there being a gas line operated by Lone Star Gas Company within one-half mile of said lands. That

said defendant failed and refused to market said gas, and in addition thereto failed and refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises in direct violation of the express terms, conditions, and covenants of the aforesaid oil and gas mining lease, which is attached to the original petition herein marked Exhibit "A", and made a part of this amended petition by reference.

6. That as a direct and proximate result of the aforesaid wrongful and illegal conduct of defendant herein, plaintiffs have been damaged in the loss of royalty, resulting from the waste occasioned by the wrongful and illegal operations of said written oil and gas mining lease (Exhibit "A" to the original petition, and made a part hereof by reference, as aforesaid) in the amount of ONE HUNDRED FOURTEEN THOUSAND DOLLARS ($114,000.00), and that all of said damages are the direct and proximate result of the wrongful and illegal breach of said written agreement and covenants, as aforesaid, as of August 9, 1961.

7. Plaintiffs further state that all the damages herein alleged by them were damages sustained as a result of continuing and continuous tortious action on the part of defendant.

8. Plaintiffs further allege and show to this Honorable Court that plaintiffs are the real parties in interest in this controversy, and that the United States of America is trustee of the benefits to which plaintiffs are entitled to receive in this action, and that the United States of America has consented to plaintiffs instituting this cause of action against defendant, and has authorized plaintiffs to employ attorneys for the prosecution of this action.

9. Plaintiffs further allege and show that the recovery herein to which plaintiffs are entitled to have and receive should be received and paid in accordance with the laws of the United States pertaining to the premises.

Plaintiffs reserve the right to further amend, at the date of trial hereof, and to set forth any additional damages which may have resulted in any continuous damages in the premises.

WHEREFORE, premises considered, plaintiffs pray for judgment against defendant in the amount of ONE HUNDRED FOURTEEN THOUSAND and NO/100 DOLLARS ($114,000.00), with interest and costs, and for such additional amount of damages which may have accrued at the date of the trial, the same to be paid as by law provided, and for such other relief as plaintiffs may be entitled to have and receive in the premises.

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ CHARLES HILL JOHNS
CHARLES HILL JOHNS

Attorneys for Plaintiffs

ATTORNEYS' LIEN RESERVED:

/s/ Houston Bus Hill
HOUSTON BUS HILL

/s/ Charles Hill Johns
CHARLES HILL JOHNS

A copy of the within and foregoing amended petition was mailed to Mr. John H. Cantrell, attorney at Law, 2120 First National Building, Oklahoma City, Oklahoma, attorney for defendant, this 18th day of July, 1963.

/s/ Charles Hill Johns
CHARLES HILL JOHNS

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Jul 19 10:27 AM '63

DALE SMITH, COURT CLERK

BY HARLAN SMITH

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STRIKE FROM AMENDED PETITION, DEMURRER TO AMENDED PETITION AND OBJECTION TO VENUE

Comes now the defendant, Skelly Oil Company, a corporation, and moves the Court to strike from the Amended Petition of the plaintiffs herein each of the following impertinent, redundant, irrelevant and immaterial matters contained in said Amended Petition, to-wit:

1. All of numerical paragraph 7, on page 3 of said Amended Petition;

2. Each of the following allegations found and contained in numerical paragraph 8, on page 3 of said Amended Petition:

(a) "that plaintiffs are the real parties in interest in this controversy,";

(b) "that the United States of America has consented to plaintiffs instituting this cause of action against defendant,"; and (c) "has authorized plaintiffs to employ attorneys for the prosecution of this action.".

DEMURRER

Said defendant demurs generally and specifically to the Amended Petition of the plaintiffs, and separately and severally to each separate alleged, asserted and pretended cause of action therein upon each, every and all of the following grounds, to-wit:

(1) Plaintiffs have no capacity to maintain this action;

(2) Plaintiffs have no legal title to the choses in action sought to be asserted by them;

(3) The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that plaintiffs are not the proper parties to institute and maintain this suit;

(4) The said Amended Petition shows on its face that plaintiffs cannot recover in this action;

(5) Plaintiffs are not the real parties in interest within the intent, meaning and contemplation of the Oklahoma Statutes prescribing who may institute and maintain an action of this kind;

(6) Said Amended Petition shows on its face that conditions precedent to recovery have not been performed;

(7) Said Amended Petition shows on its fact that plaintiffs have not exhausted their administrative remedy or attempted to do so and said Amended Petition wholly fails to allege that plaintiffs have even sought to avail themselves of administrative remedies available to them and prescribed by law;

(8) Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against this defendant;

(9) This Court is without jurisdiction over the subject matter of this action if, and as far as, any cause of action attempted to be asserted by plaintiffs sounds in tort; and

(10) Said Amended Petition shows on its face that the applicable statute of limitations as contained in 12 O.S.A. S 95 bars recovery by plaintiffs.

Objection to Venue

This defendant asserts that if, and as far as, any cause of action and for any ground for recovery by plaintiffs sounds in tort or is asserted as a tort action, the venue is improperly laid and no venue exists therefor in Oklahoma County, Oklahoma, or in this Court and this defendant hereby asserts such want of venue, objects thereto and moves the Court for dismissal of such cause of action.

Respectfully submitted,

SKELLY OIL COMPANY, a Corporation,
Defendant.

By S. W. Wells /s/
Postoffice Box 1650
Tulsa 2, Oklahoma

/s/ John H. Cantrell
John H. Cantrell
CANTRELL, DOUGLASS, THOMPSON & WILSON
2120 First National Building
Oklahoma City 2, Oklahoma

Attorneys for the Defendant,
Skelly Oil Company

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 5th day of August, 1963, I served the above and foregoing Motion To Strike From Amended Petition, Demurrer to Amended Petition And Objection To Venue upon the plaintiffs in said cause by mailing to counsel of record for said plaintiffs in said cause, in envelopes properly addressed and with postage thereon fully prepaid, true and correct copies of said Motion To Strike From Amended Petition,

Demurrer To Amended Petition And Objection To Venue as follows, to-wit:

Houston Bus Hill, Attorney at Law
1409 Liberty Bank Building,
Oklahoma City 2, Oklahoma

Charles Hill Johns, Attorney at Law
Cravens Building
Oklahoma City 2, Oklahoma

Dated this 5th day of August, 1963.

/s/ John H. Cantrell

ENDORSED:

FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG 5 9:29 AM '63

DALE SMITH, COURT CLERK

BY W. F. Miller, Jr.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

ORDER SUSTAINING DEMURRER AND JUDGMENT DISMISSING CAUSE

Now on this 20th day of September, 1963, there comes on for further hearing and decision upon the demurrer of the defendant, Skelly Oil Company, to the Amended Petition of the plaintiffs. The plaintiffs appear by their attorneys of record, Charles Hill Johns and Houston Bus Hill and the defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that the Court has concluded that the said demurrer of said defendant should be sus-

tained. The Court, therefore, finds and orders that said demurrer to said Amended Petition be sustained, to which finding and order of the Court plaintiffs and each of them except and exceptions are allowed. Plaintiffs elect to stand upon their said Amended Petition and decline to plead further, whereupon the Court finds and orders that plaintiffs' said Amended Petition and the above styled and numbered cause each should be and is hereby dismissed at plaintiffs' cost, to which actions of the Court the plaintiffs and each of them except and exceptions are allowed.

The plaintiffs, and each of them, thereupon give notice in open court of their intention to appeal to the Supreme Court of Oklahoma and ask and direct that such notice of intention to so appeal be entered upon the trial docket of the Court which is accordingly done. Plaintiffs, and each of them, having requested an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, in which to make and serve case-made upon such appeal, such request is granted and plaintiffs are hereby granted and allowed an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, within which to make and serve case-made upon appeal to the Supreme Court of Oklahoma. The parties are granted three days from and after the date of service of the said case-made within which to suggest amendments thereto with said case-made to be settled and signed upon three days notice in writing given by plaintiffs to defendant or by defendant to plaintiffs.

/s/ A. P. VAN METER
DISTRICT JUDGE

OK as to form:

/s/ Houston Bus Hill
/s/ Charles Hill Johns
Attorneys for Plaintiffs

/s/ John H. Cantrell
/s/ S. W. Wells
Attorneys for Defendant

ENDORSED:
FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Sep 25 11:37 AM '63
DALE SMITH, COURT CLERK
BY D. J. Fowler

FILED
In Supreme Court
of Oklahoma
NOV 15 1963
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON, Plaintiffs in Error,	
vs.	No. 40777
SKELLY OIL COMPANY, a corporation, Defendant in Error,	

PETITION IN ERROR

COME now Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, and each of them, Plaintiffs in Error, and complain of said Defendant in Error for that the said Skelly Oil Company at the July term of the District Court of Oklahoma County, State of Oklahoma, recovered a judgment; by the consideration of said Court, wherein the cause of action of Plaintiffs in Error was dismissed upon the Court sustaining a demurrer to the Amended Petition of Plaintiffs in Error,

in a certain action then pending in said Court wherein said Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson were Plaintiffs, and said Skelly Oil Company was Defendant. Original Case-Made duly signed, attested and filed is hereto attached, market Exhibit "A", and made a part of this Petition in Error; and the said Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, and each of them aver that there is error in said record and proceedings in this, to-wit:

1. Said Court erred in sustaining the Demurrer of the Defendant in Error to the First Amended Petition of Plaintiffs in Error, excepted to by Plaintiffs in Error.

2. Said Court erred in sustaining Demurrer and entering judgment dismissing cause to the Second Amended Petition of Plaintiffs in Error, excepted to by Plaintiffs in Error.

WHEREFORE, Plaintiffs in Error, and each of them, pray that said Order Sustaining Demurrer to Amended Petition of Plaintiffs in Error and Judgment Dismissing Cause may be reversed, set aside and held for naught, and that said cause be remanded directing the trial Court to set aside said judgment dismissing cause and overrule Demurrer of Defendant in Error to Plaintiffs in Error's Amended Petition, and for such other relief as to the Court may seem just.

Houston Bus Hill

HOUSTON BUS HILL
1409 Liberty Bank Building
Oklahoma City 2, Oklahoma

Charles Hill Johns

CHARLES HILL JOHNS
815 Cravens Building
Oklahoma City 2, Oklahoma

ATTORNEYS FOR PLAINTIFFS
IN ERROR

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Petition in Error was mailed this 15th day of November, 1963, to the attorneys for the Defendants in Error, Mr. John H. Cantrell, First National Bank Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Tulsa 2, Oklahoma.

Houston Bus Hill

HOUSTON BUS HILL

FILED
Supreme Court
of Oklahoma
MAR 23 1964
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

MOTION TO DISMISS APPEAL

COMES now the Defendant in Error, Skelly Oil Company, a corporation, and moves the Court to dismiss this appeal and the cause attempted to be instituted and prosecuted thereby for each of the following reasons:

1. Neither the Transcript (case-made) nor the Petition in Error nor any other document filed herein contains the required Certificate by a Judge (or Clerk) of the trial court "specifically stating, by day, month and year the latest date by which the Petition in Error can be filed in the Supreme Court" to comply with 12 O.S., 1963 Supp. 972(c) and Sec. 956.2 referred to therein; and

2. No motion for new trial was filed in the trial court, as then obviously required by Sec. 12 O.S., 1963 Supp. Sec. 651.

The judgment sought to be appealed from herein was rendered on September 20, 1963 (Tr. Cm. pp. 96, 97-99).

12 O.S., 1963 Supp. 972 became effective as law on September 13, 1963. 12 O.S., 1963 Supp. 651 became effective as law on June 13, 1963.

No motion for new trial was filed in this cause. No required Certificate of the trial judge (or clerk) was obtained and none is of record herein.

Therefore, dismissal is mandatory and this Court has no jurisdiction to entertain or consider this appeal and has no discretion to exercise in the matter. The appeal must be dismissed.

A Brief in Support of this Motion is attached hereto and submitted herewith.

Respectfully submitted,

SKELLY OIL COMPANY, a corporation

By S. W. Wells
S. W. Wells
Skelly Building
Tulsa, Oklahoma

By John H. Cantrell
John H. Cantrell
2120 First National Bldg.
Oklahoma City, Oklahoma

ATTORNEYS FOR SKELLY OIL COMPANY,
A Corporation

CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for the Defendant in Error in the above styled and numbered cause, do hereby certify that on the 23 day of March, 1964, I served the above and foregoing Motion to Dismiss Appeal upon the Plaintiff in Error in said cause by mailing in envelopes properly addressed with postage thereon fully prepaid, true, correct and complete copies of said Motion to the attorneys of record in said cause for said Plaintiff in Error, to-wit:

Charles Hill Johns
Attorney at Law
815 Cravens Building
Oklahoma City 2, Oklahoma

and

Houston Bus Hill
Attorney at Law
1801 First National Building
Oklahoma City 2, Oklahoma

Dated this 23 day of March, 1964.

John H. Cantrell

FILED
In Supreme Court
of Oklahoma
JUL 7 1964
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	[Officially Reported 394 P.2d 515]
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

SYLLABUS

1. Mere failure to attach a certificate specifying the latest date for the commencement of a proceeding in error in the Supreme Court does not render the "reception" of an appeal "inadvertent" within the meaning of 12 O. S. Supp., 1963, Sec. 972(c), and if an appeal be timely brought, its dismissal is not required by that statute.

2. By the terms of 12 O. S. Supp., 1963, Sec. 651, an error in determining an issue of law was placed in the same category as error occurring during the trial, and neither may be presented for review in the Supreme Court unless the aggrieved party assigned it in the motion for new trial which was acted upon and denied by the trial court.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Honorable A. P. Van Meter, Judge

MOTION BY DEFENDANTS IN ERROR TO DISMISS APPEAL FOR FAILURE TO COMPLY WITH THE PROVISIONS OF 12 O. S. SUPP., 1963, SECS. 651 and 972(c).

STATUTES CONSTRUED

MOTION DENIED

Charles Hill Johns,
Oklahoma City, Oklahoma
and
Houston Bus Hill,
Oklahoma City, Oklahoma,

of Counsel: Smith, Johns & Neuffer For Plaintiffs in Error

S. W. Wells,
Tulsa, Oklahoma
and
Cantrell, Douglass, Thompson & Wilson
Oklahoma City, Oklahoma, For Defendant in Error.

BERRY J:

In this proceeding in error by case made plaintiff below seeks review of an adverse judgment sustaining defendant's demurrer to the petition and dismissing the action. Defendant moved to dismiss the appeal urging two grounds:

(1) Plaintiff neglected to comply with the "mandatory" provisions of 12 O. S. Supp. 1963, Sec. 972(c) by his failure to timely procure and attach to the petition in error, or the case made, the required trial judge's certificate specifying the latest date for the commencement of this appeal; and

(2) Plaintiff neglected to comply with the "mandatory" provisions of 12 O. S. Supp. 1963, Sec. 651, because no motion for new trial was presented below and denied by the lower court, but the appeal is sought to be prosecuted directly from the adverse judgment.

The contentions, as outlined, present for our construction two recently enacted amendatory statutes. Both questions raised are of first impression. Their determination is urgently needed for the guidance of the bench and bar. Mindful of these considerations, the court directed that its disposition of defendant's motion be effected by an opinion to be promulgated in advance of the regular submission of this cause on its merits.

An appeal is governed by the provisions of the law which were in force and effect at the time the judgment sought to be reviewed was rendered. Mariett et al v. Newton, et al., 67 Okl. 150, 169 Pac. 488. The judgment under review was rendered on September 20, 1963,—12 O. S. Supp. 1963, Sec. 972(c), passed without an emergency clause, became effective ninety days after the adjournment of the 1963 legislative session, or on September 13, 1963. Art. 5, Sec. 58, Okla. Const. Therefore, the cited enactment was in force and effect when judgment was rendered herein and is applicable to this proceeding in error.

The terms of 12 O. S. Supp. 1963, Sec. 972(c), insofar as they apply hereto, require that every proceeding in error "shall have attached to it a certificate, executed by a judge of the trial court, specifically stating by day, month and year the latest date by which the petition in error can be filed in the Supreme Court . . ." in compliance with the applicable statutes. In the concluding sentence the Act provides that "In case of an inadvertent reception of such appeal, it shall be dismissed promptly by the Chief Justice . . ."

Defendant argues that plaintiff's failure timely to procure and attach the certificate prescribed by Sec. 972(c),

supra, operates to render the "reception" of this appeal "inadvertent" and requires its dismissal.

Sec. 972(c) forms a part of S.B. 50 and H. B. 558, S.L. 1963, pgs. 115, 241. Both bills are identical. According to their title, the Act requires "the dismissal of an appeal that is filed late." Viewed in the light of its own language, the title clearly provides that the appeals required to be dismissed are only those which are found to have been filed late.

In view of our constitutional provision requiring that the subject of a legislative Act shall be clearly expressed in its title, Art. 5, Sec. 57, Okla. Const., the Legislature is bound by its selection of a restrictive title and such title has the effect of limiting the text of an Act. The title itself will be construed with reference to the language employed in it alone and not in the light of what the body of the Act contains. Excise Board of Washita County v Lowden, 189 Okl. 286, 116 P. 2d 700, 702.

No contention is made here that this proceeding was brought too late. We conclude that mere failure to attach a certificate specifying the latest date for the commencement of a proceeding in error will not render the "reception" of an appeal "inadvertent." The dismissals commanded by Sec. 972(c), supra, relate to appeals which were in fact "filed late."

The other amendatory statute under consideration is H. B. 562, S.L. 1963, p. 326, 12 O. S. Supp. 1963, Sec. 651. By this enactment a re-examination of an issue of law became included in the statutory definition of a new trial. Defendant asserts that this inclusion makes it now *mandatory* that errors in resolving an issue of law be preserved for review by a motion for new trial. The question to be decided is, therefore, whether the amendatory Act in question *requires or merely authorizes* that a re-examination of an issue of law be sought by motion for new trial and that such motion be acted upon before errors assigned therein may be presented for review.

This is an appeal from the judgment entered for defendant upon sustaining its demurrer to plaintiff's petition. Before the amendment under consideration was enacted, the law stood firmly settled that (1) an appeal from lower court's order sustaining a demurrer to the petition and dismissing the action presents an error apparent upon the face of the judgment roll; (2) such appeal may be prosecuted directly from the judgment (without preserving the errors for review by motion for a new trial or formal exceptions) either by transcript of the record or by case made. 12 O. S. 300, 193 P 2d 306 308; Oxford v State, 80 Okl. 103, 194 Pac. 101; Stone v Clogston, 25 Okl. 162, 105 Pac. 642; Pure Oil Co v. Quarles, 183 Okl. 418, 82 P 2d 970; Commercial Discount Co. v. Navel, Okla., 385 P 2d 476, 478; and (3) a motion for new trial is neither necessary nor authorized to present for review errors in entering judgment for the defendant upon sustaining his demurrer to the petition. This is because the purpose of a motion for new trial (under Sec. 651, supra, before its amendment here under consideration) is to procure a re-examination of an issue of fact in the same court, and "there is no such thing as a new trial of issues of law." Clapper v Putnam Co. 70 Okl. 99, 158 Pac. 297, 298; Wagner v A. T. & S. F. R. Co., 73 Kan. 283, 85 Pac. 299; Chivers v Board of Com'rs. of Johnston County, 62 Okl. 2, 161 Pac. 822, 824.

In contrast to the rule just stated, errors *occurring during the trial* cannot be considered by the Supreme Court unless the aggrieved party has filed a motion for new trial, presented it to the lower court and met with adverse disposition thereof. Archerd v Ware, 115 Okl. 100, 242 Pac. 1943, 1044; Cogshall et al v Spurry, Kan., 38 Pac. 154, 155; Beall v Mutual Life Ins. Co. of New York, et al., 7 Okl. 285, 54 Pac. 474, 475; Bradford v Brennan, 15 Okl. 47, 78 Pac. 387, 388; Stinchomb et al v Myers, 28 Okl. 597, 115 Pac. 602, 603.

Plaintiff urges that a motion for new trial was not necessary here because the amendatory Act, H. B. 562, S.L. 1963, p. 326, cannot be viewed as repealing or abridging any existing provisions of the law which contemplate

or expressly authorize an appeal from the judgment alone in order to procure a review of errors apparent on the face of the judgment roll. Cited in support of this argument are 12 O. S. 1961, Secs. 952, 953, 956 and 972; all of which are said to reflect that an appeal may be taken from either a judgment or final order in the case. We are also urged that mere failure to file a motion for new trial does not require a dismissal of appeal, but at most operates to confine inquiry on review to those errors which appear on the face of the judgment roll. Hyre v Pratt, Okl., 382 P 2d 18, 21.

In testing the effect of the amendatory Act which included in the definition of a new trial a re-examination of an issue of law, we are reminded of the rule that:

> "A statute, as amended, is to be construed as a consistent whole, in harmony with common sense and reason, and every part should be given effect if possible. * * *" 82 C.J.S., Statutes, Sec. 384, p. 898.

> "* * * Amendments are to be construed together with the original act to which they relate as constituting one law, and also together with other statutes on the same subject . . . . as part of a coherent system of legislation; * * *" 82 C.J.S., Statutes, Sec. 384, p. 898.

> "* * * Where an amendment is subject to two constructions, either of which is warranted by its language, that is to be preferred which harmonizes with the act amended. If there is an irreconcilable conflict, the amendatory act will be counted as being the latest expression of the legislature; * * *" 82 C.J.S., Statutes, Sec. 384, p. 897.

In ascertaining the legislative intent, we must be aware that the lawmaking body amended Sec. 651, supra, with full knowledge of the existing law and that its provisions, as construed by this court, did then require rather than merely authorize a motion for new trial to procure review of errors occurring during the trial. Moreover, we

must presume that the Legislature, when adopting the amendment, had in mind such judicial construction. The duty is ours to now adhere to the construction previously placed upon Sec. 651, and to construe the original language and that contained in the amendment as a harmonious whole. 82 C.J.S., Statutes, Sec. 384, p. 900; Letteer v Conservancy District No. 30, in Tulsa, Osage, Rogers and Washington Counties, Okla., 385 P 2d 796. In the process of discovering that elusive quantity called "the legislative intent",

> "* * The old law should be considered, the evils arising under it, and the remedy provided by the amendment, and *that construction of the amended act should be adopted which will best repress the evils and advance the remedy . . . .*" 82 C.J.S., Statutes, Sec. 384, p. 898. (Emphasis ours)

The mischief sought to be corrected by the amendment in Sec. 651 was the uncertainty and doubt which existed in many instances as to the necessity for a motion for new trial. The situation contributed to a dismissal of a large number of appeals, and in borderline cases caused a cautious practitioner to perfect both an appeal from the judgment and one from the order overruling motion for new trial. In re Fullerton's Estate, Okla., 375 P 2d 933.

It is clear that by amending Sec. 651, the Legislature intended and sought to place errors "occurring during the trial," whose preservation by a motion for new trial was mandatory in order to procure their review, in precisely the same category as errors in determining an issue of law, which under the prior law, the trial court had no authority to re-examine on motion for a new trial. The amendment clearly contemplated to give the same meaning and effect to issues of law as had previously been given to issues of fact. We hold that errors in resolving an issue of law may be presented for review only if such errors were assigned in the motion for new trial, and the motion was presented to, and acted upon by, the lower court. A contrary con-

struction of Sec. 651 would destroy the legislative purpose and perpetuate the odious and archaic distinction between two classes of errors—a distinction which the lawmaking body manifestly sought to eliminate from our procedure.

Where there are two or more acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable, but, if a repugnancy exists between such provisions, the more recent act, which is the latest expression of the legislative will, will operate as a repeal of the former to the extent of the repugnancy. 75 O. S. 1961, Sec. 22; Dunlap v Board of Com'rs of Carter County et al., 85 Okl. 295, 205 Pac. 1100, 1103. Any statutes presently in force which indicate that an appeal will lie to this Court either from a judgment or final order must be deemed repealed by implication to the extent that such language may be repugnant to and in conflict with the mandatory provisions of Sec. 651, supra, as amended by the 1963 Legislature.

The amendment to Sec. 651, supra, was clearly intended to remove a trap in our existing appellate procedure. The terse language of the amendment did not afford sufficient notice to the bench and bar of its far-reaching effect on procedure governing review in this Court. Our present pronouncement effects a drastic change of a crucial step in the perfection of an appeal. We are mindful that because of our decision many litigants, who relied upon the statutory provisions held in this opinion to have been repealed by implication to the extent of their repugnancy to Sec. 651, as amended, may lose their appeals. This, of course, would create the very opposite result from that which the Legislature desired by the change, since the amendment was manifestly designed to eliminate a serious trap in order to afford greater protection to the litigants.

Our pronouncement as to the necessity for filing motion for new trial to preserve, for review, errors in determining an issue of law, shall therefore operate prospec-

tively and apply with effect only to appeals in cases where judgment was rendered after this opinion becomes final. This course is taken to avert injustice and unnecessary hardship to litigants and to fully effectuate the legislative purpose. Oklahoma County v Queen City Lodge, 195 Okl. 131, 156 P 2d 340, 355; Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, 148; 77 L. Ed. 360, 85 A.L.R. 254.

Since our construction of Sec. 651, as amended, is held to apply prospectively only, the motion to dismiss is denied. BLACKBIRD, C.J., AND HALLEY, V.C.J., AND DAVISON, JOHNSON, WILLIAMS AND IRWIN, JJ: CONCUR.

FILED
Supreme Court
of Oklahoma
MAY 24 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,	)	[Not Officially Reported]
Plaintiffs in Error,	)	
vs.	)	No. 40777
SKELLY OIL COMPANY, a corporation,	)	
Defendant in Error,	)	

SYLLABUS

1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil

and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY,

HON. A. P. VanMETER, JUDGE.

Action by Frank Poafpybitty et al against Skelly Oil Company for damages. From a judgment sustaining defendant's demurrer to plaintiffs' amended petition and dismissing the cause, plaintiffs appeal.

AFFIRMED

Charles Hill Johns, and
Houston Bus Hill,
Oklahoma City, For Plaintiffs in Error,

S. W. Wells, Tulsa, and
John H. Cantrell,
Cantrell, Douglass, Thompson & Wilson,
Oklahoma City, For Defendant in Error.

PER CURIAM:

This is a suit by the restricted Indian heirs of a member of the Comanche tribe of Indians to whom, as allottee, a tract of land in Stephens County was conveyed by a trust patent from the United States, in which the plaintiffs seek to recover from the defendant, Skelly Oil Company, lessee

under a departmental oil and gas lease, royalties on gas which the plaintiffs allege the company permitted to escape and go to waste from the land. From a judgment of the District Court of Oklahoma County sustaining the demurrer of the defendant to the amended petition of the plaintiffs and dismissing the cause on their refusal to plead further, this appeal was prosecuted.

In the amended petition the plaintiffs alleged that they are the owners and in possession of a quarter section of land in Stephens County, said land being held in trust for them by the United States Government under the General Allotment Act of February 8, 1887, said lands being under the jurisdiction and control of the Secretary of the Interior acting by and through the Area Director of the Bureau of Indian Affairs and the Commissioner of Indian Affairs; that on May 28, 1947, the plaintiffs, as lessors, executed and delivered to the defendant, Skelly Oil Company, as lessee, a departmental oil and gas lease which was approved by the Acting Commissioner of Indian Affairs of the United States Department of the Interior, for a primary term of ten years, which expired June 27, 1957, same to continue as much longer thereafter as oil and/or gas is produced in paying quantities from said land. A copy of the lease was attached to and made a part of the petition.

Plaintiffs further alleged that during the year 1956 the lessee drilled seven oil and gas wells on said land, all of which wells were completed as commercial producers; that shortly after the wells were completed demand was made by the plaintiffs on the lessee to market the gas being produced and flared from said wells, there being a gas line operated within a half mile from said land; that the defendant lessee failed and refused to exercise reasonable diligence in the prevention of waste of said gas as required by the lease, but, instead permitted the gas to escape and become wasted, contrary to the terms of the lease, causing the plaintiffs to lose their royalty from said escaping gas in the sum of $114,000.00, for which they prayed judgment.

Plaintiffs further alleged that they are the real parties in interest and that the United States is trustee for their benefit, and that the United States has consented to instituting this action by the plaintiffs and has authorized the plaintiffs to employ attorneys for the prosecution of the case.

The lease provides that the lessee shall pay to the Secretary of the Interior a royalty consisting of 12½% of the value or amount of all oil, gas, natural gasoline and all other hydrocarbon substances produced and saved from the leased land, save and except oil and/or gas used by the lessee for development and operation purposes on the leased premises, which shall be royalty free; that lessee shall furnish the Secretary of the Interior monthly statements showing the amount, quality and value of all such products produced and saved from the leased premises during the preceding calendar month; that the leased premises and wells, producing operations, improvements, machinery, and fixtures on said lease and connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior; that the lessee shall exercise reasonable diligence in drilling and operating wells for oil and gas purposes, and shall carry on all operations in a good and workmanlike manner in accordance with approved methods and practice having due regard for the prevention of waste of oil and gas developed on the land; shall carry out at its expense all reasonable orders and requirements of the oil and gas supervisor of the Department of the Interior relative to the prevention of waste and preservation of the property and the health and safety of workmen; that it shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to the lease; that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any wells drilled when in his judgment such action may be

necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor. The lease gives the Secretary of the Interior the right to declare the lease null and void, after notice and hearing, for violation of any of the terms and conditions of the lease *before restrictions are removed*, "provided that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The plaintiffs argue the case under two propositions:

1. That as beneficial owners of the land and lessors they have the right to maintain this action, notwithstanding the fact that as Indian Citizens they hold equitable title under a Trust Patent and the lease was required to be approved by the Commissioner of Indian Affairs, citing 42 C.J.S. Indians, sec. 8, page 653; Smith v. Northern Pacific Rep. Co., 57 Mont. 14, 186 P. 684, 686; Sadler v. Public National Bank and Trust Co. of New York, 172 F.2d 870; Bonnet v. Seekins, 243 P.2nd 317 (Mont.); Brown v. Anderson, 160 P. 724, 61 Okl. 136; Choctaw and Chicasaw Nations v. Seitz, 193 F.2d 456.

2. That as such beneficial owners, they have the right to maintain this action without joining the United States, which holds the land as trustee for them, citing Bush v. Missouri State Life Ins. Co., 207 P. 317, 86 Okl. 182; Smith v. Burt, 150 Okla. 34, 300 P. 748; Siniscal v. United States, 208 F.2d 406.

The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action.

The defendant calls attention to numerous rules and regulations promulgated by the Secretary of the Interior dealing with such departmental oil and gas leases, which

have the force and effect of law, and of which the Federal and State courts take judicial notice. Diehl v. Phillips Petroleum Co., 376 P.2d 203 (Okl.); Seber v. Spring Oil Co., 33 F.Supp. 805. The regulations so prescribed among other things, define the duties of the supervisor, who is a representative of the Secretary of the Interior, under directions of the Director of the United States Geological Survey, in supervising and directing oil and gas operations. Among such regulations that are pertinent to the questions here involved are those appearing at 7 F.R. 1433-4135-4140 and Title 30, Code Of Federal Regulations (CFR), January, 1966 Revision, in part, as follows:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary

widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. * * *."

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor. * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor. * * *."

Tit. 25 CFR, sec. 172.23 provides in part:

> "(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated. * * *."

The regulations provide for appeals from orders made, under the regulations to the Director and from the Director to the Secretary, and procedure for such appeals is prescribed.

We do not find the authorities relied upon by the plaintiffs helpful in deciding their right to prosecute this action and recover judgment. None of those authorities deals with the rights and liabilities of the parties to a Departmental oil and gas lease giving the Secretary of the Interior and his subordinates wide authority over the development and operation of such leases as is the case under the terms of the lease and the regulations that apply to it, made pursuant to the law and the terms of the lease, which are herein quoted. Nor does the defendant cite any cases dealing specifically with the rights of lessor under such a lease.

The Secretary of the Interior is in effect made guardian of the restricted Indian lessors in dealing with the lessee in the development and operation of the lease and the lessors are given no express authority to deal with the lessee in its development and operation. The lessee is required to comply with the written directions of the Supervisor in carrying out the terms of the lease and applicable regulations, and the Secretary of the Interior may cancel the lease on application of the lessors for failure of the lessee to comply with the provisions of the lease or regulations, and there is no allegation in the petition that the defendant has failed to comply with any directions given it by the Supervisor. The exclusive authority of the Secretary of the Interior and his subordinate officers shall continue so long as the restric-

tions on the Indian lessors are in effect. In paragraph 6 of the lease, it is provided "that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee." We think, under the maxim *"expressio unius est exclusio alterius"*, this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed.

The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in developing and operating the lease, and in the absence of a violation of any such direction it is not liable in a suit for damages. The fact that the United States authorized the plaintiffs to employ counsel and consented to the filing of the suit as alleged in plaintiffs' petition did not create a cause of action in favor of the plaintiffs contrary to the terms of the lease and the rules and regulations promulgated by the Secretary of the Interior.

The trial court properly sustained the demurrer to the amended petition.

Judgment affirmed.

The Court acknowledges the services of Thurman S. Hurst, who with the aid and counsel of George S. Downey and David L. Fist, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the Court. The Chief Justice then assigned the case to Blackbird, J., for review and study, after which and upon consideration by the Court, the foregoing opinion was adopted.

JACKSON, V. C. J., and DAVISON, WILLIAMS, IRWIN, BERRY, HODGES and LAVENDER, JJ., concur.

FILED
In Supreme Court
of Oklahoma
JUN 7 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, June 7, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

40777—Frank Poafpybitty, et al v Skelly Oil Co.
Plaintiffs in Error granted until June 23, 1966, to file Petition for Rehearing.

Harry L. S. Halley,
Chief Justice.

FILED
In Supreme Court
of Oklahoma
JUN 21 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, June 21, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

40777—Frank Poafpybitty et al v Skelly Oil Co.
Plaintiffs in error granted until July 8, 1966, to file Petition for Rehearing. This extension is final.

Harry L. S. Halley
Chief Justice

FILED
Supreme Court
of Oklahoma
JUL 5 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

PETITION FOR REHEARING

COME NOW Plaintiffs in Error and respectfully show to this Honorable Court that the opinion and judgment of this Court promulgated and rendered herein on May 24, 1966, overlooked decisive questions of law and fact, appearing herein, which entitle plaintiffs in error to a rehearing in this case, as follows:

1. This Court in its opinion and judgment construed Laws of the United States, to-wit: 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January, 1966 Revision, Sections 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60, and Title 25 C.F.R. Section 172.23, and the said opinion and judgment of this Court is in direct conflict with decisions of the United States Court of Appeals of the Tenth Circuit, and the Supreme Court of the United States.

2. The opinion and judgment of this Court predicated its decision upon the legal maxim "Expressio unius est exclusio alterius" and in said opinion and judgment has

overlooked previous decisions of this Court defining the application of this legal maxim, and has overlooked and misconstrued the separate covenants and provisions of the lease itself, and said opinion and judgment is exactly contrary to the settled judicial construction of the United States Courts upon such Federal Regulations and Departmental Indian Oil and Gas Mining Leases.

3. That the laws of the United States providing for Departmental Oil and Gas Leases upon Restricted Lands of Certain Indians, and all Federal Regulations pertaining thereto, are solely for the protection of such Indian Lessors, and cannot be interposed by a Lessee to avoid liability for the breach of express and implied covenants of such oil and gas mining lease.

4. That the opinion and judgment of this Court in construing said Federal Laws, and said Departmental Oil and Gas Lease so as to deny plaintiffs in error the right to institute and maintain this action violates and offends the rights of plaintiff in error under the Fifth (5th) and Fourteenth (14th) Amendments of the Constitution of the Unied States and deprives plaintiffs in error of their property without due process of law.

WHEREFORE, plaintiffs in error pray that a Rehearing be granted herein. Brief attached hereto.

Chas. Hill Johns

CHARLES HILL JOHNS
815 Cravens Building
Oklahoma City, Oklahoma

Houston Bus Hill

HOUSTON BUS HILL
First National Building
Oklahoma City, Oklahoma

ATTORNEYS FOR PLAINTIFFS IN ERROR

FILED
In Supreme Court
of Oklahoma
DEC 20 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, December 20, 1966

THE CLERK IS DIRECTED TO ISSUE THE FOLLOW-LOWING ORDERS:

* * *

40777—Poafpybitty, et al v Skelly Oil Co.
Rehearing and oral argument denied.

Harry L. S. Halley,
Chief Justice.

FILED
Supreme Court
of Oklahoma
FEB 1 1967
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

MOTION TO STAY MANDATE AND FOR CLERK TO TRANSMIT ORIGINAL OF COPIES OF RECORD

Plaintiffs in Error move this Court to stay the Mandate in this case pending the outcome of their petition to the Supreme Court of the United States in this cause.

Notice of appeal has been duly filed.

Plaintiffs in Error also request the Court to order the Clerk to transmit either the original record or copy if available of the designated certiorari record herein.

Chas Hill Johns

CHARLES HILL JOHNS
218 Oklahoma Journal Building
Midwest City, Oklahoma

Houston Bus Hill

HOUSTON BUS HILL
1415 First National Building
Oklahoma City, Oklahoma

Attorneys for Plaintiffs in Error

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Motion to Stay Mandate was mailed this 1st day of February, 1967, to the attorneys for defendant in error, Mr. John H. Cantrell, 2120 First National Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Skelly Building, Tulsa, Oklahoma.

Chas Hill Johns

Charles Hill Johns

FILED
Supreme Court
of Oklahoma
FEB 1 1967
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

NOTICE OF PETITION FOR CERTIORARI AND APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, plaintiffs in error herein, hereby give notice of appeal to the Supreme Court of the United States from the judgment and opinion of the Supreme Court of the State of Oklahoma, entered in this case on May 24, 1966, and the order and judgment denying petition for rehearing herein, on December 20, 1966, and the order and judgment denying the second petition for rehearing on January 31, 1967.

2. This appeal is taken pursuant to Title 28, U.S.C. Sections 1257 (2), (3) and Section 2101 (c) and Rule 19 of The Supreme Court of the United States.

3. The Clerk of the Court will please prepare a transcript of the record herein for certiorari and transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Copy of the Casemade herein.

b. Copy of the opinion and judgment of the court herein filed May 24, 1966.

c. Copy of all Briefs filed herein.

d. Copy of Petition for Rehearing and Brief of Plaintiffs in Error, and Order denying same.

e. Copy of Second Petition for Rehearing and Brief of Plaintiffs in Error and Order denying same.

f. Copy of this Notice.

Questions Presented

The following questions are presented by this appeal.

1. That the Supreme Court of the State of Oklahoma in its opinion and judgment herein construed Laws of the United States, and construed erroneously a Departmental Oil and Gas Mining Lease of restricted Indian lessors made and executed pursuant to the Laws of the United States and said opinion and judgment of the Supreme Court of Oklahoma is in conflict with and contrary to decisions of the United States Court of Appeals of the Tenth Circuit and the Supreme Court of the United States.

2. That the opinion and judgment of the Supreme Court of Oklahoma in construing the terms and provisions of the Departmental Indian Oil and Gas Mining Lease involved and the Federal Regulations pertaining thereto, i.e., 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Sections 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60, and Title 25 C.F.R. Section 172, 23, misconstrued the separate covenants and provisions of the lease itself, and erroneously construed said Federal Regulations pertaining thereto, said opinion and judgment of the Supreme Court of Oklahoma being exactly contrary to the settled judicial construction of the United States Court of Appeals of the Tenth Circuit and the Supreme Court of the United States concerning Departmental Indian oil and gas mining leases and Federal Regulations pertaining thereto.

3. That the Laws of the United States providing for Departmental oil and gas mining leases upon restricted lands of certain Indians, and all Federal regulations pertaining thereto, are solely for the protection of such Indian lessors, and such regulations cannot be interposed properly

by a lessee to avoid liability to such Indian lessor for the breach of express and legally implied covenants of such an oil and gas mining lease.

4. That the opinion and judgment of the Supreme Court of Oklahoma herein, in denying plaintiffs in error (Indian lessors) the right to institute and maintain this action for breach of the covenants of said Departmental oil and gas lease, when the United States after due notice elected to not enter into this case, violates and offends the rights of plaintiffs in error (Indian lessors) herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives plaintiffs in error of their property without due process of law.

5. The opinion and decision herein is the result of a preliminary advisory opinion of Thurman S. Hurst, George S. Downey and David L. Fist, private attorneys. Plaintiffs in error submit that the opinion and decision herein violates and offends against Article 7, Section 5, and Article 2, Section 6, Constitution of Oklahoma, in that there is no authority in the Constitution or the Laws of the State of Oklahoma authorizing any private attorney, or panel of private attorneys, to prepare an opinion for the Supreme Court of Oklahoma, advisory or otherwise. Further Article 2, Section 6, Constitution of Oklahoma provides that the Courts of Oklahoma shall be administered without prejudice, and the said opinion prepared by said private attorneys in this cause has prejudiced the rights of plaintiffs in error herein as the said opinion of said private attorneys herein has influenced this court in adopting the opinion and decision herein as an opinion and decision of this court, thereby depriving plaintiffs in error of their property without due process of law contrary to Article 2, Section 7, Oklahoma Constitution and contrary to the Fourteenth (14th) Amendment to the Constitution of the United States.

6. The opinion and decision herein violates and offends against the rights of plaintiffs in error, citizens and

residents of the United States under Article 1, Section 1, Article 2, Section 7, Constitution of Oklahoma, and under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States in that the opinion and decision herein has deprived plaintiffs in error of their property without due process of law contrary thereto.

Chas Hill Johns

CHARLES HILL JOHNS
218 Oklahoma Journal Building
Midwest City, Oklahoma

Houston Bus Hill

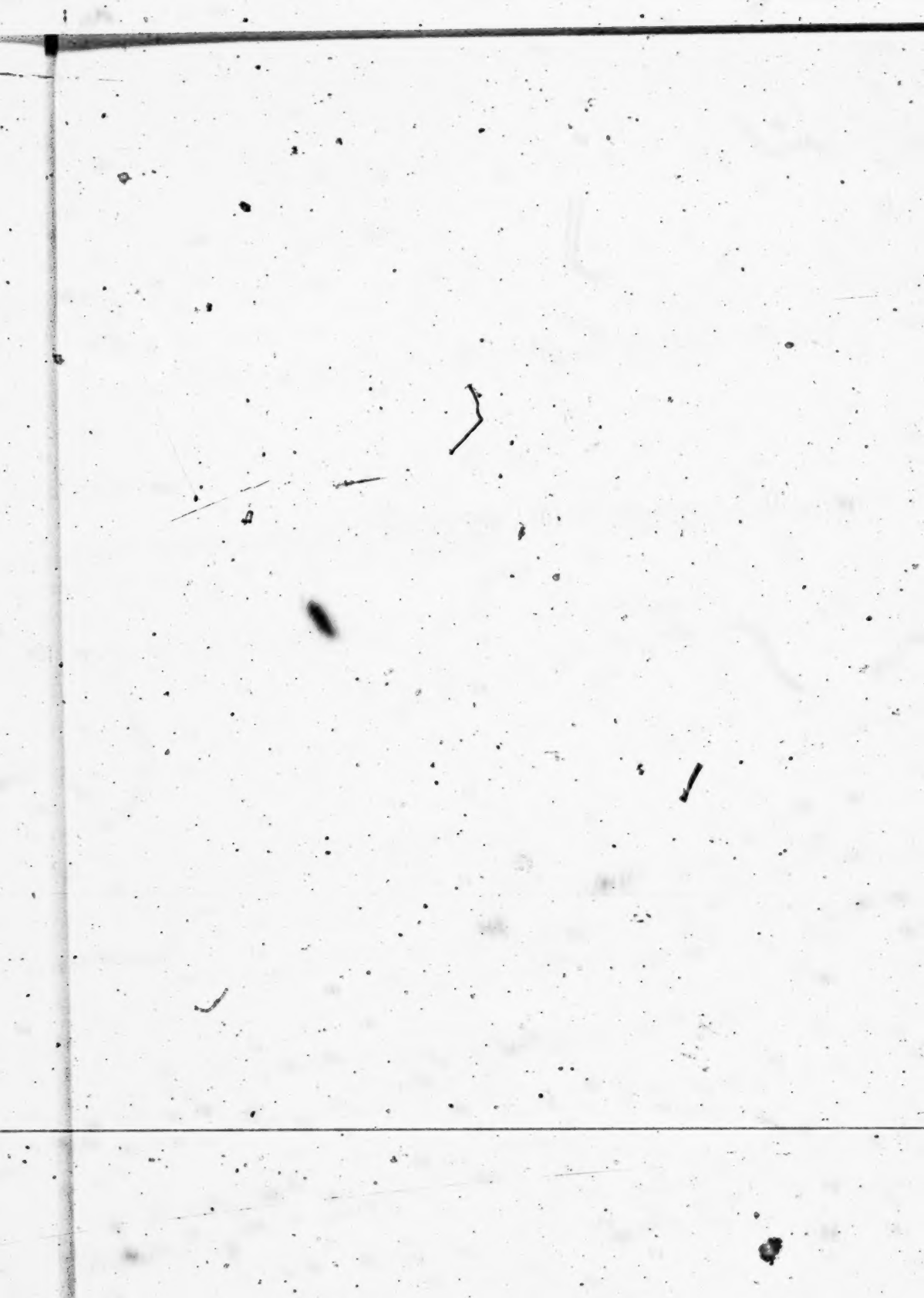
HOUSTON BUS HILL
1415 First National Building
Oklahoma City, Oklahoma

CERTIFICATE

This is to certify that a true and correct copy of the within and foregoing Notice of Appeal was mailed this 1st day of February, 1967, to the attorneys for defendant in error, Mr. John H. Cantrell, 2120 First National Building, Oklahoma City, Oklahoma, and Mr. S. W. Wells, Skelly Oil Company, P. O. Box 162, Skelly Building, Tulsa, Oklahoma.

Chas Hill Johns

Charles Hill Johns



Supreme Court, U.S.
FILED
MAR 17 1967
JOHN F. DAVIS, CLERK

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1156 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES HILL JOHNS
218 Oklahoma Journal Building
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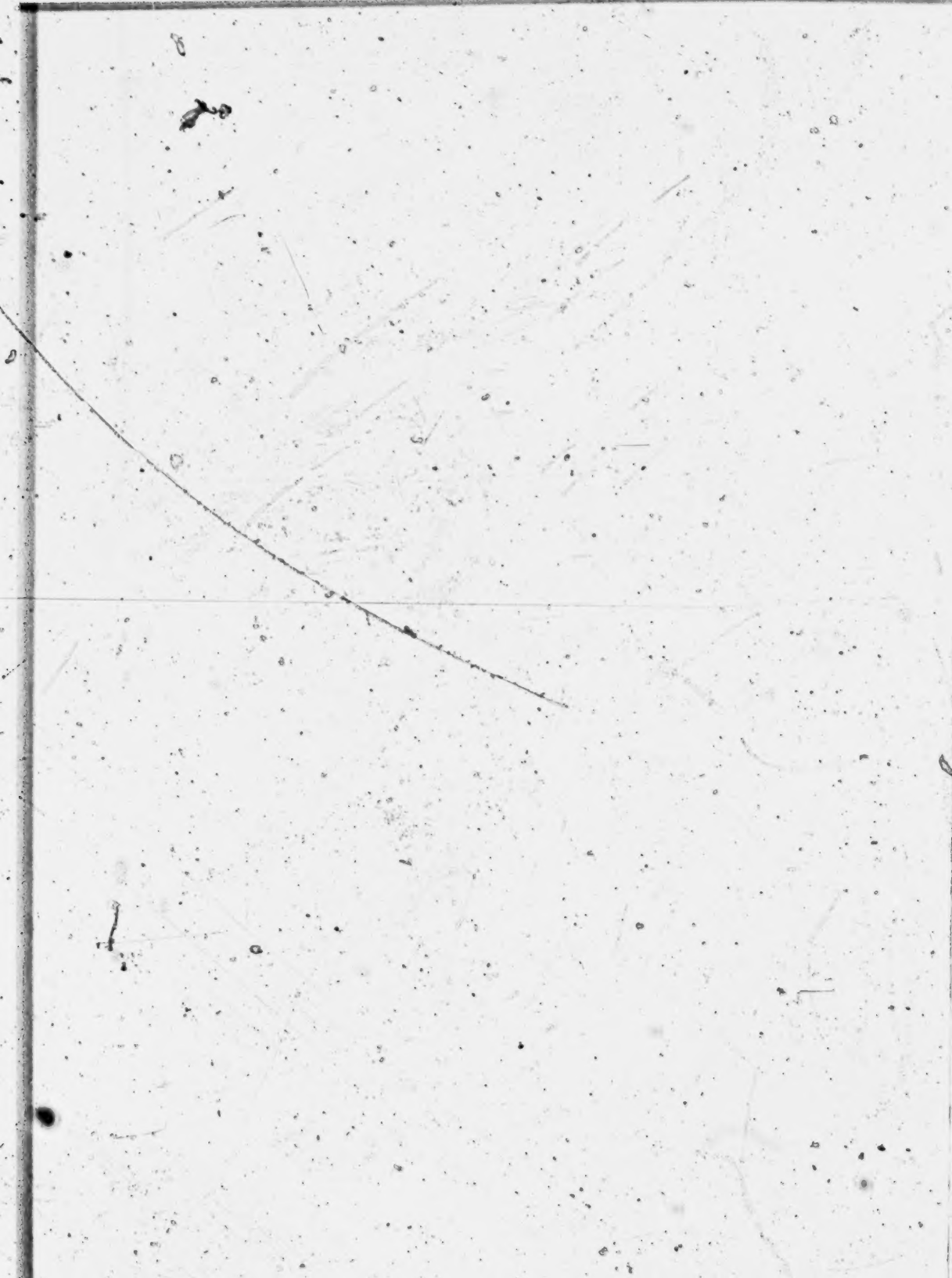
1415 First National Building
Oklahoma City, Oklahoma

Attorneys for Petitioners

March, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030



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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a writ of certiorari issue to the Supreme Court of Oklahoma to review the opinion and judgment of the Supreme Court of Oklahoma, of May 24, 1966. Petition for rehearing, timely filed, and denied on December 20, 1966, and application for leave to file second petition for rehearing denied on January 31, 1967.

OPINION BELOW

The opinion and judgment of the trial court and the Supreme Court of the State of Oklahoma are printed as an appendix hereto, as the same are not officially reported.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Oklahoma was entered on May 24, 1966 (Appendix hereto). A petition for rehearing was timely filed on July 8, 1966, and denied December 20, 1966. An application for second petition for rehearing was denied January 31, 1967. The jurisdiction of the court is invoked under Title 28 U.S.C.A. Section 1257 (2) (3) and Rule 19 of the Supreme Court of the United States. The petitioners have exhausted all of their state court remedies. The constitutional and federal questions were presented to the Supreme Court of the State of Oklahoma in the petition for rehearing and in the application for leave to file second petition for rehearing (R. 136 and 139), such constitutional and federal questions first arising herein on May 24, 1966, when the opinion and judgment of the Supreme Court of the State of Oklahoma was rendered and entered herein.

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Oklahoma in its opinion and judgment of May 24, 1966, erroneously construed the terms and provisions of the Departmental Oil and Gas Mining Lease of Restricted Lands of the Indian Petitioners herein, and federal regulations pertaining thereto, *viz,* 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63 and 221.60 and Title 25 C.F.R. Section 172.23.

2. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein is not in accord with applicable decisions of this Court.

3. Whether the Laws of the United States providing for Departmental Oil and Gas Mining Leases upon restricted lands of Indian petitioners, and all federal regulations pertaining thereto are for the protection of Indian petitioners, as lessors, and whether such federal regulations can be interposed by respondent lessee herein to avoid liability for damages resulting from breach of express and implied covenants of such oil and gas mining lease.

4. Whether Indian petitioners, as lessors in a Departmental Oil and Gas Mining Lease on restricted lands, can institute and maintain this action for damages for waste of natural gas by lessee in violation of the express and implied covenants of said lease contract, after due and proper notice has been given the United States, as by law provided, and the United States has elected not to enter such case in behalf of Indian lessors, petitioners herein.

5. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein, in denying petitioners (Indian lessors) the right to institute and maintain this action against respondent (lessee) for damages for waste of natural gas by respondent in violation of express and implied covenants of Departmental Oil and Gas Mining Lease, when the United States after due notice elected not to enter into this case violates and offends the rights of petitioners herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives petitioners of their property and rights without due process of law.

6. Whether the opinion and decision of the Supreme Court of Oklahoma herein has deprived petitioners of their

property and property rights without due process of law in violating Article 1, Section 1, Article 2, Sections 6 and 7, Constitution of Oklahoma and contrary to, and in violation of the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States inasmuch as said opinion and judgment resulted from a preliminary advisory opinion of private attorneys and there being no authority in the Constitution and laws of the State of Oklahoma authorizing any private attorney, or panel of private attorneys, to prepare an opinion for the Supreme Court of Oklahoma, advisory or otherwise.

CONSTITUTION INVOLVED

The Constitution of the State of Oklahoma, Article 1, Section 1:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 6:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for very wrong and and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Constitution of the United States, 5th Amendment:

"No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment:

"Nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

On November 15, 1963, petitioners filed suit against respondent for damages alleging respondents breached express and implied covenants of a Departmental Oil and Gas Mining Lease upon the restricted Indian lands of petitioners who are Comanche Indians, by wasting natural gas from leased lands. Petitioners are lessors in said lease and respondent is lessee therein (R. pp. 5-14). Notice was given the United States (R. 39-43).

Respondent interposed a demurrer to petitioners' Amended Petition and the trial court sustained its demurrer, and entered judgment against petitioners (R. 97, Appendix A). An appeal was perfected to the Supreme Court of Oklahoma, and on May 24, 1966, an opinion and judgment of the Supreme Court of Oklahoma was entered affirming the judgment of the trial court (Appendix B). Petitioners filed a timely petition for rehearing, which was denied on December 20, 1966. An application for second petition for rehearing was denied on January 31, 1967.

Notice of appeal was filed and served upon respondent on February 1, 1967 (R. 142).

REASONS FOR GRANTING THE WRIT

The questions presented by petitioners not only are important to petitioners, as Indian citizens of the United States, but are important to every Indian citizen of the United States who owns restricted lands. The rights of all Indian lessors of restricted lands in Departmental Oil and Gas Mining Leases, as a class, are affected herein, and such rights should be determined by this Court.

This suit is one for money damages. Federal Regulations do not provide for assessment of money damages by administrative procedure. Federal Regulations do provide for cancellation of the lease for certain reasons. This suit is not for the cancellation of the oil and gas mining lease. It may be that administrative proceedings before the Secretary of the Interior are a condition precedent to an equitable proceeding to cancel the oil and gas mining lease involved. But that question is not before this Court herein. The question here is whether an Indian lessor can sue a lessee in a Departmental Oil and Gas Mining Lease for money damages for waste of natural gas by such lessee, and whether such Indian lessor can maintain such a suit after due notice has been given the United States and the United States has elected not to enter into the case.

In *Heckman* v. *United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820, this Court determined a restricted allottee could sue or defend actions in his own behalf subject only to the right of the United States to intervene. In *Heckman*, it is said (56 L.Ed. 833):

> "In what cases the United States will undertake to represent Indian owners of restricted lands of this sort is left, under the acts of Congress, to the discretion of

the executive department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case. . . ."

In *Sadler* v. *Public National Bank & Trust Co.*, 172 F.2d 874, the Court of Appeals of the Tenth Circuit held squarely that a restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. The only difference between an Indian in such case as this, and other litigants, is that when such an Indian files suit notice must be served upon the United States, which notice was served in this case.

The *Heckman* and *Sadler* cases involved restricted Indians of the Five Civilized Tribes, and petitioners here are Comanche Indians, but we submit the principle is identical. These cases establish clearly that an Indian lessor in a Departmental Oil and Gas Lease, as well as the United States, has the capacity to sue relative to causes of action arising from breach of covenants of such a lease.

The opinion of the Supreme Court of Oklahoma states in part (Appendix B, pp. x, xi):

> "The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in devolping and operating the lease, and in the absence of a violation of any such direction it is not liable in a suit for damages. . . ."

Title 30, Chapter 11, Section 221.35, C.F.R. provides as follows:

"§ 221.35 Waste prevention: beneficial use.

"The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market or return it to the productive formation. If waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise at a price not less than 5 cents for each 1,000 cubic feet, unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of value and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Petitioners allege in their amended petition that demand was made upon respondent lessee to market gas being produced and flared from producing wells; that there was a pipeline for market of such gas within one half (½) mile of said wells; that respondent lessee wrongfully and illegally committed waste of such natural gas; and that petitioners, as lessors, were damaged in the sum of $114,000.00 (R. 83-88).

Under the law of Oklahoma a lessee in an oil and gas lease is liable in damages for waste, and failure to market gas produced. *Junction Oil & Gas Co.* v. *Pratt*, 99 Okla. 14, 225 Pac. 717; *North American Petroleum Co.* v. *Knight* (Okla.), 321 P.2d 964.

Herein petitioners have sued respondent for money damages alleging breach of express and implied covenants

of said oil and gas mining lease. The express provisions of the lease pleaded (R. 10-14), and the allegations of wrongful and illegal waste of natural gas by respondent (R. 83-88) clearly state a cause of action.

We assert herein that under the lease itself, and under the Federal Regulations, Title 30, Section 221.35, C.F.R., *supra*, the representatives of the United States could not permit or condone the wasting of natural gas by respondent. The only circumstances where such conduct of respondent lessee would be sanctioned legally would be under facts which would be sanctioned by both the laws of the United States and the State of Oklahoma.

The trial court sustained a demurrer of respondent (R. 57 and Appendix A). The Supreme Court of Oklahoma in its opinion affirmed the trial court (Appendix B). A demurrer, under the law of Oklahoma, admits the truth of all allegations, and reasonable inferences to be drawn therefrom. *Farmers and Merchants Nat. Bank* v. *Lee*, 192 Okla. 9, 132 P.2d 931.

We submit that inasmuch as petitioners allege ". . . that said defendant failed and refused to market said gas . . . wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises . . ." (R. 85), and respondent's demurrer has admitted the truth of said allegations, the opinion and judgment of the Supreme Court of Oklahoma is erroneous, and a writ of certiorari herein should be granted.

Petitioners contend there is an additional reason for granting a writ in this case. The opinion of the Supreme Court of Oklahoma shows on its face that a panel of three

(3) private attorneys prepared a preliminary advisory opinion for the Supreme Court of Oklahoma. Petitioners had no notice or knowledge of the participation of the private attorneys in the decision and opinion of the Supreme Court of Oklahoma until the said decision was entered.

Article 2, Section 6, Oklahoma Constitution provides that right and justice shall be administered by the courts of justice of Oklahoma without sale, denial, delay or prejudice.

We submit that this Court has been *influenced* by the advisory opinion of the panel of three (3) lawyers engaged in the private practice of law.

"Prejudice" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "To cause to have prejudice; Bias the mind of: as, to prejudice the members of a jury."

"Bias" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "Biased or Biassed: Biasing or Biassing: To give bias to: to influence: prejudice: preposses."

"Influence" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "The act or the power of producing an effect without apparent force or direct authority: an influence by suggestion."

The impetus of our argument in this respect is that the decision and opinion of the Supreme Court of Oklahoma was influenced by a panel of three private lawyers. We do not charge any corruption, nor ulterior motives of anyone.

But we do assert that the opinion and decision of the Supreme Court of Oklahoma was the result of influence upon the Supreme Court, in violation of the Constitution of Oklahoma and the same offends and violates the rights of petitioners under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

We submit that influence can be exercised by mental persuasion, which is tantamount to coercion. *Chambers* v. *Florida,* 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472; *Garrity* v. *New Jersey,* — U.S. —, 17 L.Ed.2d 562, 87 S.Ct. —.

The fairness requisite to due process requires an absence of actual bias in the trial of cases. *In re Murchison,* 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, it is said:

> "A fair trial in a fair tribunal is a basic requirement of due process."

See also 16 Am.Jur.2d, Constitutional Law, § 582, p. 988; *Moore* v. *Dempsey,* 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265.

Actually, in this case, the panel of private attorneys who prepared the preliminary advisory opinion herein performed a function the same as if they had been advocates for respondent. The converse would apply if their preliminary advisory opinion had been favorable to petitioners. There is no statute, or constitutional provision, in Oklahoma authorizing private attorneys to prepare opinions for the Supreme Court of Oklahoma, advisory or otherwise. Clearly these private attorneys influenced the decision and opinion herein.

The basic requirements of the Fourteenth Amendment apply to property rights in civil litigation the same as life and liberty in criminal proceedings. Herein, every Indian resident and citizen who owns restricted land is affected. Also every citizen of Oklahoma is affected.

We respectfully submit that the questions involved herein are of great public interest and affect a great number of people as a class, and pray that this Court, in its sound judicial discretion, grant the Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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Midwest City, Oklahoma 73110

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Oklahoma City, Oklahoma

Attorneys for Petitioners

March, 1967

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY AND LAVERNE AITSON,
Plaintiffs,

vs

No. 154040

SKELLY OIL COMPANY, a corporation,
Defendant.

ORDER SUSTAINING DEMURRER AND JUDGMENT DISMISSING CAUSE

Now on this 20th day of September, 1963, there comes on for further hearing and decision upon the demurrer of the defendant, Skelly Oil Company, to the Amended Petition of the plaintiffs. The plaintiffs appear by their attorneys of record, Charles Hill Johns and Houston Bus Hill and the defendant appears by its attorneys of record, S. W. Wells and John H. Cantrell.

The case having been called and the parties so appearing, the Court announces that the Court has concluded that the said demurrer of said defendant should be sustained. The Court, therefore, finds and orders that said demurrer to said Amended Petition be sustained, to which finding and order of the Court plaintiffs and each of them except and exceptions are allowed. Plaintiffs elect to stand upon their said Amended Petition and decline to plead further, whereupon the Court finds and orders that plaintiffs' said Amended Petition and the above styled and numbered cause each should be and is hereby dismissed at plaintiffs' cost, to which actions of the Court, the plaintiffs and each of them except and exceptions are allowed.

The plaintiffs, and each of them, thereupon give notice in open court of their intention to appeal to the Supreme

Court of Oklahoma and ask and direct that such notice of intention to so appeal be entered upon the trial docket of the Court which is accordingly done. Plaintiffs, and each of them, having requested an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, in which to make and serve case-made upon such appeal, such request is granted and plaintiffs are hereby granted and allowed an extension of time of thirty days in addition to the time allowed by law, and to-wit: 45 days from this date, within which to make and serve case-made upon appeal to the Supreme Court of Oklahoma. The parties are granted three days from and after the date of service of the said case-made within which to suggest amendments thereto with said case-made to be settled and signed upon three days notice in writing given by plaintiffs to defendant or by defendant to plaintiffs.

/s/ A. P. Van Meter
District Judge

OK as to form:

/s/ Houston Bus Hill
/s/ Charles Hill Johns

Attorneys for Plaintiffs

/s/ John H. Cantrell
/s/ S. W. Wells

Attorneys for Defendant.

ENDORSED:
FILED, DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
Sep 25 11:37 AM '63
DALE SMITH, COURT CLERK
BY D. J. Fowler

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY and LAVERNE AITSON,

PLAINTIFFS IN ERROR,

VS. No. 40777.

SKELLY OIL COMPANY, A Corporation,

DEFENDANT IN ERROR.

SYLLABUS

1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors.

[APPENDIX]

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY.
HON. A. P. VanMETER, JUDGE.

Action by Frank Poafpybitty et al against Skelly Oil Company for damages. From a judgment sustaining defendant's demurrer to plaintiffs' amended petition and dismissing the cause, plaintiffs appeal.

AFFIRMED

Charles Hill Johns, and
Houston Bus Hill,
Oklahoma City, For Plaintiffs in Error,

S. W. Wells, Tulsa, and
John H. Cantrell,
Cantrell, Douglass, Thompson & Wilson,
Oklahoma City, For Defendant in Error.

PER CURIAM:

This is a suit by the restricted Indian heirs of a member of the Comanche tribe of Indians to whom, an allottee, a tract of land in Stephens County was conveyed by a trust patent from the United States, in which the plaintiffs seek to recover from the defendant, Skelly Oil Company, lessee under a departmental oil and gas lease, royalties on gas which the plaintiffs allege the company permitted to escape and go to waste from the land. From a judgment of the District Court of Oklahoma County sustaining the demurrer of the defendant to the amended petition of the plaintiffs and dismissing the cause on their refusal to plead further, this appeal was prosecuted.

In the amended petition the plaintiffs alleged that they are the owners and in possession of a quarter section of land in Stephens County, said land being held in trust for them by the United States Government under the General Allotment Act of February 8, 1887, said lands being under the jurisdiction and control of the Secretary of the Interior acting by and through the Area Director of the Bureau of

Indian Affairs and the Commissioner of Indian Affairs; that on May 28, 1947, the plaintiffs, as lessors, executed and delivered to the defendant, Skelly Oil Company, as lessee, a departmental oil and gas lease which was approved by the Acting Commissioner of Indian Affairs of the United States Department of the Interior, for a primary term of ten years, which expired June 27, 1957, same to continue as much longer thereafter as oil and/or gas is produced in paying quantities from said land. A copy of the lease was attached to and made a part of the petition.

Plaintiffs further alleged that during the year 1956 the lessee drilled seven oil and gas wells on said land, all of which wells were completed as commercial producers; that shortly after the wells were completed demand was made by the plaintiffs on the lessee to market the gas being produced and flared from said wells, there being a gas line operated within a half mile from said land; that the defendant lessee failed and refused to exercise reasonable diligence in the prevention of waste of said gas as required by the lease, but, instead permitted the gas to escape and become wasted, contrary to the terms of the lease, causing the plaintiffs to lose their royalty from said escaping gas in the sum of $114,000.00, for which they prayed judgment.

Plaintiffs further alleged that they are the real parties in interest and that the United States is trustee for their benefit, and that the United States has consented to instituting this action by the plaintiffs and has authorized the plaintiffs to employ attorneys for the prosecution of the case.

The lease provides that the lessee shall pay to the Secretary of the Interior a royalty consisting of 12½% of the value or amount of all oil, gas, natural gasoline and all other hydrocarbon substances produced and saved from the leased land, save and except oil and/or gas used by the lessee for development and operation purposes on the leased premises, which shall be royalty free; that lessee shall furnish the Secretary of the Interior monthly statements

[APPENDIX]

showing the amount, quality and value of all such products produced and saved from the leased premises during the preceding calendar month; that the leased premises and wells, producing operations, improvements, machinery, and fixtures on said lease and connected therewith, and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior; that the lessee shall exercise reasonable diligence in drilling and operating wells for oil and gas purposes, and shall carry on all operations in a good and workmanlike manner in accordance with approved methods and practice having due regard for the prevention of waste of oil and gas developed on the land; shall carry out at its expense all reasonable orders and requirements of the oil and gas supervisor of the Department of the Interior relative to the prevention of waste and preservation of the property and the health and safety of workmen; that it shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to the lease; that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor. The lease gives the Secretary of the Interior the right to declare the lease null and void, after notice and hearing, for violation of any of the terms and conditions of the lease *before restrictions are removed,* "provided that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The plaintiffs argue the case under two propositions:

1. That as beneficial owners of the land and lessors they have the right to maintain this action, notwithstanding the fact that as Indian Citizens they hold equitable title

under a Trust Patent and the lease was required to be approved by the Commissioner of Indian Affairs, citing 42 C.J.S. Indians, sec. 8, page 653; Smith v. Northern Pacific Rep. Co., 57 Mont. 14, 186 P. 684, 686; Sadler v. Public National Bank and Trust Co. of New York, 172 F.2d 870; Bonnet v. Seekins, 243 P.2nd 239 (Mont.); Brown v. Anderson, 160 P. 724, 61 Okl. 136; Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456.

2. That as such beneficial owners, they have the right to maintain this action without joining the United States, which holds the land as trustee for them, citing Bush v. Missouri State Life Ins. Co., 207 P. 317, 86 Okl. 182; Smith v. Burt, 300 P. 748, 160 Okl. 34; Siniscal v. United States, 208 F.2d 48.

The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action.

The defendant calls attention to numerous rules and regulations promulgated by the Secretary of the Interior dealing with such departmental oil and gas leases, which have the force and effect of law, and of which the Federal and State courts take judicial notice. Diehl v. Phillips Petroleum Co., 376 P.2d 203 (Okl.); Seber v. Spring Oil Co., 33 F.Supp. 805. The regulations so prescribed among other things, define the duties of the supervisor, who is a representative of the Secretary of the Interior, under directions of the Director of the United States Geological Survey, in supervising and directing oil and gas operations. Among such regulations that are pertinent to the questions here involved are those appearing at 7 F.R. 1433-4135-4140 and Title 30, Code Of Federal Regulations (CFR), January, 1966 Revision, in part, as follows:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. * * *."

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of

drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor. * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calender month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor. * * *."

Tit. 25 CFR, sec. 172.23 provides in part:

"(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated. * * *."

The regulations provide for appeals from orders made, under the regulations to the Director and from the Director to the Secretary, and procedure for such appeals is prescribed.

We do not find the authorities relied upon by the plaintiffs helpful in deciding their right to prosecute this

action and recover judgment. None of those authorities deals with the rights and liabilities of the parties to a Departmental oil and gas lease giving the Secretary of the Interior and his subordinates wide authority over the development and operation of such leases as is the case under the terms of the lease and the regulations that apply to it, made pursuant to the law and the terms of the lease, which are herein quoted. Nor does the defendant cite any cases dealing specifically with the rights of lessor under such a lease.

The Secretary of the Interior is in effect made guardian of the restricted Indian lessors in dealing with the lessee in the development and operation of the lease and the lessors are given no express authority to deal with the lessee in its development and operation. The lessee is required to comply with the written directions of the Supervisor in carrying out the terms of the lease and applicable regulations, and the Secretary of the Interior may cancel the lease on application of the lessors for failure of the lessee to comply with the provisions of the lease or regulations, and there is no allegation in the petition that the defendant has failed to comply with any directions given it by the Supervisor. The exclusive authority of the Secretary of the Interior and his subordinate officers shall continue so long as the restrictions on the Indian lessors are in effect. In paragraph 6 of the lease, it is provided "that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee." We think, under the maxim *"expressio unius est exclusio alterius,"* this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed.

The lessee is entitled to rely upon the directions of the Secretary of the Interior and his subordinate officers, made under the terms of the lease and such rules and regulations, in developing and operating the lease, and in the absence

of a violation of any such direction it is not liable in a suit for damages. The fact that the United States authorized the plaintiffs to employ counsel and consented to the filing of the suit, as alleged in plaintiffs' petition, did not create a cause of action in favor of the plaintiffs contrary to the terms of the lease and the rules and regulations promulgated by the Secretary of the Interior.

The trial court properly sustained the demurrer to the amended petition.

Judgment affirmed.

The Court acknowledges the services of Thurman S. Hurst, who with the aid and counsel of George S. Downey and David L. Fist, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the Court. The Chief Justice then assigned the case to Blackbird, J., for review and study, after which and upon consideration by the Court, the foregoing opinion was adopted.

JACKSON, V. C. J., and DAVISON, WILLIAMS, IRWIN, BERRY, HODGES and LAVENDER, JJ., concur.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1156~~ 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOHN H. CANTRELL
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P. O. Box 1650
Tulsa, Oklahoma

Attorneys for Respondent,
Skelly Oil Company

April, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1156

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PRELIMINARY STATEMENT

Respondent asserts that the judgments of the state courts are correct and that certiorari should be denied.

The District Court of Oklahoma County, Oklahoma, sustained defendant's demurrer to the final Amended Petition of plaintiffs, Petitioners herein, and said plaintiffs refusing to plead further the court dismissed the action (R. 97; Appendix A to Petition herein). This was affirmed by the Supreme Court of Oklahoma (Appendix B to Petition herein). So, if the decision sustaining the demurrer was right upon any ground, or for any reason, affirmance was required. This is elementary under established Oklahoma law. The trial court's decision was thus affirmed.

SUMMARY OF ARGUMENT

Among the grounds presented in and by the demurrer for dismissal of the action and a brief summary of the argument thereon are:

1. Said Petition wholly fails to state facts sufficient to state a cause of action in favor of the plaintiffs and against this defendant;

2. Facts pleaded in the Petition, when considered with those of which the court was and is required to take judicial notice, preclude recovery by plaintiffs;

3. Plaintiffs have no legal title to the chose in action sought to be asserted by them;

4. The contract relied upon and which forms the alleged basis for plaintiffs' claimed right to recover shows on its face that in any event plaintiffs are not the proper parties to institute and maintain this suit;

5. Said Amended Petition shows on its face that conditions precedent to recovery have not been performed;

6. Said Amended Petition shows on its face that plaintiffs have not exhausted their administrative remedy or attempted to do so and said Amended Petition wholly fails to allege that plaintiffs have even sought to avail themselves of administrative remedies available to them and prescribed by law.

TRUE CHARACTER OF THE CASE

Notwithstanding statements of Petitioners (Petition for Certiorari, pp. 3, 5, 8-9) tending to mislead this Court to the contrary, this was an action in contract upon the

lease involved and was not an action for damages sounding in tort. This clearly appears from the record.

At page 35 of the case-made appears a motion filed in the court below to require the plaintiffs to elect whether they will proceed upon the contract or upon tort. At page 37 appears the "Journal Entry" covering the order made by the trial court upon this motion which *by agreement of the parties*, strikes from the Petition the allegation that defendant violated the conservation statutes of the State of Oklahoma and denies defendant's motion to require an election upon the following recited commitment of plaintiffs' counsel to the court:

> "2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition and that only recovery in contract will be sought in this action by plaintiffs, the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative motion of said defendant to require separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason;"

ARGUMENT

I.

The Opinion of the Supreme Court of Oklahoma

The Supreme Court of Oklahoma largely based its decision upon and in consideration of the following proposition stated by defendant in its brief:

Proposition One

The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.

It is to be noted that the defendant did not urge and the Supreme Court of Oklahoma did not decide that plaintiffs could not prosecute the action merely because they were restricted Indians. The personal incapacity of the plaintiffs was not urged nor was it decided. The defendant merely asserted, and now asserts, and the Supreme Court of Oklahoma only held that these plaintiffs could not ignore the covenants of their lease (including the regulations and the law forming a part thereof) and institute and maintain an action contrary thereto, and thus assert a cause of action they did not possess and which they did not control, and then only by virtue of assuming the existence of facts essential to their case but not alleged and not possible of good faith allegation under the circumstances.

By the express terms of the lease (par. 3(c), Appendix A hereto, p. ii)* and the regulations (Section 172.14, Appendix A hereto, p. v)* all bonuses, rents, royalties and funds payable on account of or under the lease can only be paid to the Secretary of the Interior or his designee. The Secretary, and only the Secretary, can have, recover, receive or control these funds.

As to this point, the law seems to be clear. The terms of the lease, the statutes of Oklahoma, the statutes of the United States, the rules and regulations of the Secretary

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* Pertinent portions of the lease and of the Regulations are set out in Appendix A hereto.

of the Interior (which must be read into the lease) and the decisions of the state courts and of the federal courts preclude the institution and maintenance of this action for recovery by the plaintiffs.

This is not to say that the Indians themselves are incapacitated as litigants but it is to say that by the law and their contract the Indians are precluded from recovery.

Upon consideration of paragraph 6 of the controlling lease (Appendix A hereto, p. iii) together with the other provisions of the lease, paragraphs 2, 3(b)(1); 3(c); 3(d); 3(f); 3(g); 8; 10 (Appendix A hereto, pp. i to iv), and the broad specific authority reserved to the Secretary and his designees by the Rules and Regulations, Chapter 1, Bureau of Indian Affairs—Title 25, Part 189, and Leasing of Allotted Lands for Mining, Part 172, and Code of Federal Regulations—Title 30, Mineral Resources, Part 221, Oil and Gas Operating Regulations (Appendix A hereto, pp. iv to x), it becomes conclusively apparent that the Indians *agreed* that they would neither have, nor exercise nor seek to exercise any right to institute, maintain or prosecute any claim "at law or in equity" either upon the lease or for breach thereof. Please bear in mind that the Secretary, *as a federal restriction* upon the lease, the land it covered and the emoluments thereof, unconditionally reserved the right to determine all the incidents of the lease, including what amounts would be due to be paid thereon, their origin, their nature and the time of payment. This necessarily included the right to determine the negatives also, *i.e.*, what is not payable and what were proper operations, what use of gas by lessee was royalty free, and all the circumstances which entered into all these things. This is accentuated by

reference to Title 25, Section 172.23 (Appendix A hereto, pp. viii-ix) which says that the "Secretary" will cancel the lease *if at any time* he is satisfied that the provisions of the lease or the regulations have been violated. Since he has not "cancelled" the lease here involved it must be concluded that he has ascertained that neither the lease nor the regulations have been violated. It was exactly *because* of these rights of affirmative *and negative* determination that it was expressly stated (Appendix A hereto, p. iii) by the Secretary in his required form of lease (par. 6) that *only* where "restrictions are removed" can Lessors (the Indians):

> "be entitled to any available remedy in law or equity for breach of this contract by the lessee."

These restrictions have never been removed.

This is substantially what the Supreme Court of Oklahoma decided and confirmed. Many decided cases and the opinions therein support this conclusion. While the Supreme Court of Oklahoma did not cite all of them, we consider the following authorities pertinent and supporting:

—*Seber* v. *Spring Oil Co.*, 33 F.Supp. 805 (D.C., Okla., 1940);

Town of Okemah, Oklahoma v. *United States*, 140 F.2d 963 (10th Cir., 1944);

Hansen v. *Hoffman*, 113 F.2d 70 (10th Cir., 1940);

United States v. *Hinkle*, 261 Fed. 518 (8th Cir., 1919);

United States v. *Fitzgerald*, 201 Fed. 295 (8th Cir., 1912);

United States v. *Hellard*, 322 U.S. 363 (1944);

LaMotte v. *United States*, 254 U.S. 570 (1921);

United States v. *Noble*, 237 U.S. 74 (1915);

In re Long's Estate, 207 Okla. 259, 249 P.2d 103 (1952).

State action, legislative or judicial, may not set aside nor alter, modify or evade United States restriction on Indian lands. A requirement by regulation that mineral rentals, royalties and profits from a lease on restricted Indian lands be paid to the Secretary of the Interior is a federal "restriction" which the state courts must honor and abide by. If the relief sought would, if granted, conflict or interfere with United States restrictions, management, supervision or operations of Indian lands or their profits or rentals or royalties therefrom, then no relief can be granted. Such must be an invariable principle, or federal "rules and regulations" might as well not be provided for or adopted.

—*Bunch* v. *Cole*, 263 U.S. 250 (1923);

Bowling v. *United States*, 233 U.S. 528 (1914);

Chisholm v. *House*, 160 F.2d 632 (10th Cir., 1947);

United States v. *Moore*, 284 Fed. 86 (8th Cir., 1922);

Phenninghausen v. *Horineck*, 112 Okla. 94, 240 Pac. 81 (1925);

Williams v. *Lee*, 319 P.2d 998, 1003 (Ariz. 1958).

Thus, the cases upon which Petitioners place their sole reliance (Petition, pp. 6-7) are clearly not in point as the Supreme Court of Oklahoma found and indicated. Incidentally, the statute (Act of Congress, April 12, 1926, paragraph 3, 44 Stat. 239) forming the basis for the decision in

Sadler v. *Public National Bank and Trust Company of New York*, 172 F.2d 870 (10th Cir., 1949), involves and applies only to Indians and property of the Five Civilized Tribes and does not apply to Comanche Indians such as Petitioners here. The opportunity afforded to the Government in this case to "take over" this litigation upon behalf of the Indians, if it was deemed by the Government that a cause of action existed, was merely a gesture of grace and to afford a convenient opportunity for the only proper party to litigate the claim if a good faith claim should exist. And in truth, the whole philosophy announced by the Supreme Court in *Heckman* v. *United States*, 224 U.S. 413 (1912), supports the decisions of the state courts in the instant case.

II.

Additional Reasons for Denying Certiorari

Aside from the points particularly discussed and directly decided by the Supreme Court of Oklahoma (Appendix B to Petition) the following, not found by such court to be necessary of discussion (Appendix B to Petition, p. vii) support the judgment of that court and indicate that certiorari should be denied.

Proposition Two

Even assuming, arguendo, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.

As to this point, it will be made clear by a reading of the Amended Petition, the lease involved and the rules and regulations applicable thereto, that essential allegations to

state a cause of action are missing from the Petition. For instance, there is no allegation of a specific violation of the rules and regulations of the Secretary of the Interior or that what was done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is no allegation of application to the Secretary (or his designees) and his arbitrary or fraudulent refusal to hear or decide or to grant relief. Neither is there any allegation to challenge or negate the continuous finding and satisfaction of the Secretary of the Interior that neither the lease nor the regulations "have been violated." This finding and satisfaction are necessarily established by the absence of action by the Secretary, under the duty imposed upon him and the exclusive authority given him by Title 25, Section 172.23 (Appendix A hereto, p. viii), to cancel this lease if there has been a "violation" of the lease or regulations. It must be presumed, in the absence of specific and express allegations to the contrary, that the Secretary of the Interior through his designated Supervisor performed his full duty and adequately supervised the operation of this lease and the production of oil therefrom in the interest of the Lessors, Title 30, Section 221.4 (Appendix A hereto, p. vii), and that the rights of the Lessors were adequately and properly safeguarded in the course of these operations by the Supervisor.

—*Minter* v. *Crommelin,* 18 How. 87, 15 L.Ed. 279 (1856);

United States v. *Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir., 1956);

United States v. *Barnsdall Oil Co.*, 127 F.2d 1019 (10th Cir., 1942);

United States ex rel. Harris v. *Ragen*, 177 F.2d 303 (7th Cir., 1949);

Shafer v. *United States*, 229 F.2d 124 (4th Cir., 1956);

Bonapart v. *Nelson*, 142 Okla. 54, 285 Pac. 100 (1929).

Therefore, it must be held, in the absence of express allegation to the contrary, that the Supervisor found that under the particular circumstances there was no basis for demanding the royalties here sued for, such as: (1) that there was no market for the gas, Title 30, Section 221.35 (Appendix A hereto, p. vii); (2) that the gas vented was "beneficially consumed," Lease, paragraph 10 (Appendix A hereto, p. iv); (3) that the only alternative was to flare the gas and produce the oil and receive the oil royalties rather than to shut the oil production down and see adjoining lease production drain the oil from the Petitioners' lease, Lease, paragraph 3(b)(1) (Appendix A hereto, p. i), all the while receiving no oil royalty from oil produced; and (4) that the vented casinghead gas was used by the lessee in the production of oil and thus royalty free. It must be held that all of the factors were weighed and that it was determined that the only way to produce the oil in accordance with the terms of the lease was for Skelly to flare the casinghead gas and thus "use" the casinghead gas in the course of its operations in the production of oil. See Lease paragraph 3(c) (Appendix A hereto, p. ii) where it is agreed that:

"* * * oil, and/or gas used by the lessee for development and operation purposes on said lease * * * shall be 'royalty free.'"

If it be conclusively presumed, as it must be, that the Secretary and his Supervisor and his superior and the Commissioner of Indian Affairs did their duty, there would seem to be no question but that authorization to flare the casinghead gas *royalty free,* in order to get the oil, has been received by the lessee from the only power which could refuse such authorization. Also, under such presumption every fact, every demand, every equity, every circumstance has been considered, weighed and given effect by the Secretary. No intervention or substitution has been sought by the United States. Thus, going even beyond presumption, it is established that the United States officials did their duty and decided that there was no just cause for demand on the defendant for the alleged "royalty" sought to be recovered.

Proposition Three

Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in court.

As indicated by the lease and all the pertinent Rules and Regulations, the lessor Indians have had at all times a complete and comprehensive administrative remedy within the Department. The nature and course of such a remedy is fairly illustrated by the recitals in the opinion of the Court in *California Co.* v. *Seaton, Secretary of the Interior,* 187 F.Supp. 445 (D.C., D.C., 1960).

Sec. 172.23 of Title 25 (Appendix A hereto, p. viii) and Sec. 221.66 of Title 30 (Appendix A hereto, p. ix) of the Rules and Regulations of the Secretary of the Interior make this unmistakable and expressly clear. In the latter it is provided, *inter alia:*

> "An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. * * * An appeal to the Director may be taken from any order of the Supervisor * * *. An appeal from any decision of the Director may be taken to the Secretary * * *. With regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director."

Nothing is more fundamental nor better established than that a litigant must exhaust his available administrative remedies before seeking judicial relief. This is well established by decisions of both state and federal courts.

—*Constantin* v. *Martin,* 216 F.2d 312 (10th Cir., 1954);

Furrow & Co. v. *American Airlines,* 102 F.Supp. 808 (D.C., Okla., 1952);

Sanders v. *Oklahoma Employment Securities Commission,* 200 Okla. 366, 195 P.2d 272 (1948).

Conditions precedent to the bringing of any action have not been made or performed or alleged. Underlying requisite determinations by the Secretary of the Interior (exclusively his function), which are conditions precedent to the maturing of a cause of action, have either been made contrary to the existence of a cause of action or have not yet been made at all and are not alleged. Plaintiffs have

made no move to exercise their administrative remedy. For this reason alone, even assuming that plaintiffs otherwise would have had standing in court, the demurrer was good and must have been sustained and the action dismissed.

In its opinion (Appendix B to Petition, p. x) the Supreme Court holds, after referring to the terms of paragraph 6 of the lease, that "under the maxim 'expressio unius est exclusio alterius' this provision deprives the lessors of a right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the Petition that the restrictions have been removed." This is supported by many authorities not cited in the opinion among which are:

—*National Labor Relations Board* v. *West Kentucky Coal Co.*, 116 F.2d 816 (6th Cir., 1940);

Cornell v. *McAllester*, 121 Okla. 285, 249 Pac. 959 (1926);

National Gas Development Corp. v. *Oklahoma Tax Commission*, 188 Okla. 557, 111 P.2d 483 (1941).

III.

Oklahoma Supreme Court Procedure

Petitioners seek to complain of procedural methods of the Supreme Court of Oklahoma, adopted and used by it under its inherent powers as the highest appellate court of the sovereign State of Oklahoma, in studying the cause and obtaining preliminary reports of its Special Masters, as officers of the court, as to the nature of the cause, its issues and probable reasons for its decision. That the finality of decision and the exercise of an independent judgment by

the Supreme Court are reserved and actually exercised by that court are certain, as shown by the record in the certificate of the court itself as appended to its decision. Moreover, two Petitions for Rehearing have been independently considered and overruled by the Supreme Court of Oklahoma.

This practice of the Supreme Court of Oklahoma is of long standing, has been widely publicized, concurred in, affirmed by and participated in by members of the organized Bar in Oklahoma for a long time. Similar practices have been a part of the judicial machinery generally for almost countless years. "Special Masters" and "Referees" are old and established instrumentalities for the administration of justice.

Petitioners disavow any claim of actual prejudice, bias or error in result flowing from or sustained by virtue of the method used. They do not assert that the Certificate of the Supreme Court of Oklahoma is false in stating that the decision and opinion were the independent acts of the court after its full independent consideration. Their complaint is without substance, but the very fact that they seek to make it here and to plunge this Court into purely procedural matters and possible controversy over judicial power, authority and rectitude of a sovereign state's judiciary would alone seem to indicate that the Writ sought should be denied.

CONCLUSION

It is thus suggested that for each, every and all of the reasons above presented and upon the basis of the authorities submitted hereby, the Writ of Certiorari petitioned for should be denied.

Respectfully submitted,

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April, 1967

APPENDIX A

I. The Lease.—(C-M. 10):

The lease recites that the lessors are as follows:

"Frank Poafpybitty, Carl Poafpybitty, Thompson Poafpybitty, Louise Poafpybitty and Laverne Aitson, a minor male born in 1928, heirs of Ma-Rah-Wad-Di (Comanche) by John T. Montgomery, Superintendent, Kiowa Indian Agency, for said minor.

* * * * * *

"2. The term 'oil and gas supervisor' as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term 'superintendent' as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased."

* * * * * *

The lease recites: "$2860.80 paid to the Superintendent of the Indian Agency."

* * * * * *

"3. * * * lessee hereby agrees: (b) Wells (1) To drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining land not the property of the lessor, or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage. Provided, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior, * * * Provided, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regu-

lations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; * * *."

* * * * * *

"3. * * * the lessee hereby agrees: (c) Rental and royalty.—To pay, beginning with the date of approval of the lease by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be 'royalty free.' * * * All rental and royalty payments except as provided in Sections 8(a) and 4(c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the Superintendent." (Section 8(a) applies only when supervision by the Secretary has been relinquished. Section 4(c) applies only when royalty is paid in kind.)

* * * * * *

"3. * * * the lessee hereby agrees: (d) Monthly statements.—To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor. * * * The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open

at all times for the inspection of any duly authorized representative of the Secretary of the Interior."

* * * * * *

"3. * * * the lessee hereby agrees: (f) * * * to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to the prevention of waste and preservation of the property and the health and safety of the workmen; * * *."

* * * * * *

"3. * * * the lessee hereby agrees: (g) Regulations. —To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases; Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

* * * * * *

"6. Cancellation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land; Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

* * * * * *

"8. Relinquishment of supervision by the Secretary of the Interior.—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage cov-

ered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as provided in section 3(c) * * *."

* * * * * *

"10. Drilling and producing restrictions.—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, * * *."

II. The Regulations.—

These Regulations are found in "Chapter 1—Bureau of Indian Affairs—Title 25 Part 189 (effective till 1957) and Part 172 (effective in 1957 and thereafter)—Leasing Of Allotted Lands For Mining" and "Code of Federal Regulations —Title 30—Mineral Resources Chapter II—Part 221—Oil and Gas Operating Regulations." The references hereinafter contained will be to the numerical sections of the Chapters and Parts above referred to.

As indicated by the title description just given, Title 25, Sections 189.1 and 172.1, et seq., deal with "Leasing," the form and requisites of the lease and definitions of terms to be used therein and of officers upon whom duties and responsibilities are to be cast thereby, such as "superintendent" and "supervisor," two of the most important of said officers for present consideration.

Title 30, Sections 221.1, et seq., as indicated, deal with Oil and Gas Operations, that is, the control under the overall plan which the Government, as guardian of the Indians, has arranged, promulgated and placed in operation. These regulations also specify and define the controlling agencies of the Government.

"§ 189.1 (172.1) Definitions. (a) The term 'superintendent' in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the allotments involved.

"(b) The term 'supervisor' in this part refers to a representative of the Secretary of the Interior, under direction of the Director of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid."

* * * * * *

"§ 172.14 Payment of advance rentals and royalties. (a) Except as provided in paragraphs (b), (d) and (f) of this section, all rents, royalties and other payments due under leases which have been or may be approved in accordance with this part shall be paid by check or bank draft to the order of the Treasurer of the United States and transmitted through the supervisor to the Superintendent for deposit to the credit of the various lessors. When lessees and purchasers are instructed, in writing, by the Superintendent, which instructions shall be complete as to lessors for each lease, separate remittances for each payment due each lessor shall be made to the Superintendent." (Paragraphs (b), (d) and (f) are irrelevant here.)

* * * * * *

"§ 221.1 INTRODUCTION. The regulations in this part will govern the development and production of deposits of oil, gas and casinghead or natural gasoline, including propane, butane, and other hydrocarbons, and fluids, and lands containing such deposits owned or controlled by the United States, and under jurisdiction of the Secretary by law or administrative ar-

rangement. The regulations in this part shall be administered under the Director of the Geological Survey, except that as to lands within naval petroleum reserves they shall be administered under such official as the Secretary of the Navy shall designate."

* * * * * *

"§ 221.2 DEFINITIONS. The following terms as used in the regulations in this part shall have the meanings here given:

"(a) SECRETARY. The Secretary of the Interior, except where lands in naval petroleum reserves are involved, and in that case the Secretary of the Navy.

* * * * * *

"(c) SUPERVISOR. A representative of the Secretary, under administrative direction of the Director, authorized and empowered to supervise and direct oil and gas operations and to perform other duties prescribed in the regulations in this part, or any subordinate of such representative acting under his direction."

* * * * * *

"§ 221.3 JURISDICTION. Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or noncompliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *"

* * * * * *

"§ 221.4 GENERAL FUNCTIONS. The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the Supervisor, and to any area plan of development that may be adopted pursuant to law. * * *"

* * * * * *

Section 221.18 in part:

"The Lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, * * *."

Section 221.21 in part:

"(c) The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor."

Section 221.35 in part:

"The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid ex-

cessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Section 221.40 in part:

"(a) When due in money, the lessee shall tender all payments of rental and royalty by check or draft on a solvent bank, or by money order drawn to the order of the appropriate receiving officer, * * *."

Section 221.62 in part:

"When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *."

Section 221.63 in part:

"Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

Section 221.60 in part:

"A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor."

Title 25, Section 172.23 in part:

"(a) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the

lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated."

Title 30, Section 221.66:

"§ 221.66 Appeals. An appeal from any order issued under Authority of the regulations in this part may be filed as hereinafter set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

"(a) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of facts must be made under oath.

"(b) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises and that officer shall review the record and render such a decision in the case as he deems proper.

"(c) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's decision. The appeal shall be accompanied by such written showing and argument on the facts and law as appellant may deem adequate to justify reversal or modification of the decision. Any

statement of facts not submitted to the Director must be made under oath.

"(d) Oral argument in any case pending before the supervisor, the Director, or the Secretary will be allowed on motion in the discretion of such officer and at a time to be fixed by him.

"(e) The procedure for appeals involving leases for public land shall be followed for leases on the naval petroleum reserves and Indian land except that, with regard to the Naval Petroleum Reserves, the Director of Naval Petroleum Reserves, and with regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director."

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In the Supreme Court of the United States

OCTOBER TERM, 1966

FRANK POAFPYBITTY, ET AL., PETITIONERS

v.

SKELLY OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1156

FRANK POAFPYBITTY, ET AL., PETITIONERS

v.

SKELLY OIL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On May 8, 1967, the Court invited the views of the Solicitor General in this case, which is pending on petition for a writ of certiorari to the Supreme Court of Oklahoma.

Respondent obtained an oil and gas lease from petitioners, who are American Indians. Some time after producing wells were brought in, petitioners brought a damages action against respondent in a State court, alleging that respondent had failed to exercise reasonable diligence to prevent the waste of gas produced under the lease, in violation of the terms thereof, and had thereby impaired petitioners' royalties. The State Supreme Court sustained dismissal of the complaint on the ground that only the United

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States could sue to enforce petitioners' rights under the lease; that petitioners lacked capacity to sue. In our view, this ruling is unsound.

By the General Allotment Act, February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 *et seq.*, the Secretary of the Interior was authorized to allot to individual Indians land on Indian reservations suitable for agricultural use, by issuing patents declaring "that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made" or his heirs. Section 5 of the Act, 25 U.S.C. 348. As that provision permits, the twenty-five year period has been repeatedly extended by order of the President, and the trust continues to this day. The lease at issue in the present case involves land which petitioners hold under trust patents.

The purpose of the trusteeship was and is to prevent improvident conveyances of the allotted lands, *Heckman* v. *United States,* 224 U.S. 413, 432–438, but not, of course, to prevent the Indians from developing the resources of the lands. An oil and gas lease provides a useful method whereby the Indian can reap the fruits of his allotted land, and he is accordingly expressly authorized to make such a lease, with the consent of, and under rules prescribed by, the Secretary of the Interior for the Indian's benefit and protection. 25 U.S.C. 396. Plainly, a suit by the Indian to enforce such a lease so as to enhance his benefits thereunder is consistent with the purposes of the Act—at least, where the Secretary consents to the

bringing of the suit. Petitioners' damages action against respondent was a suit of this character and the Secretary consented to its institution.

We emphasize that the Act's trust provisions are not premised on any view that Indians, like children or the insane, are wholly incapable of acting in their own affairs. The provision (mentioned above) which authorizes allottees to make leases belies any such view. More clearly still, the Act expressly authorizes suits by Indians against the United States to establish entitlements to allotments, 25 U.S.C. 345, and adverts to "actions brought in any State court or United States court by any patentee * * * for the possession or rents or profits of" lands under trust patent, 25 U.S.C. 347. Thus, the statutory scheme is to establish a limited federal guardianship, but not to disable the Indians from attempting to enforce and protect their interests in allotted lands by legal proceedings. Not surprisingly therefore, this Court, in the landmark case of *Heckman* v. *United States, supra,* expressly assumed the Indians' right to litigate with respect to allotted lands, 224 U.S. at 442, 445–446, and this assumption was unquestioned until the present litigation. See, *e.g., Choctaw and Chickasaw Nations* v. *Seitz,* 193 F. 2d 456 (C.A. 10).

The issue of the capacity of an Indian to sue under trust patents has not arisen frequently, doubtless due to the pervasiveness of the Secretary of the Interior's supervision. In the present case, the terms of the lease relating to waste, when read against the pertinent rules of the Secretary, clearly vest in his subordinates broad discretion and control over the lessee's opera-

tions (see Br. in Opp., App., pp. iii, vii-viii). If the lessee fails to operate in conformity with the directions of the federal supervisors and waste results, the Secretary will, of course, be quick to institute his own action to enforce the lease; his standing to do so is established by *Heckman* v. *United States, supra.* If the lessee does comply, as was believed by the responsible officials of the Department of the Interior to be the case here, the liklihood of a successful suit by the Indian lessor charging violation of the lease is plainly remote; accordingly, such suits are rarely brought. But should the Indian disagree with the federal supervisors and believe the lease was violated, the Secretary will normally, as here, consent to the Indian's bringing his own suit. And in such a case—for the reasons mentioned earlier—we think it clear that the suit cannot properly be dismissed for lack of capacity to institute a legal proceeding with respect to allotted lands.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 1967.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted] 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN REPLY TO SUGGESTIONS OF THE SOLICITOR GENERAL

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July, 1967

UTTERBACK TYPESETTING CO., 13 SQ. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1156

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY, a Corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN REPLY TO SUGGESTIONS OF THE SOLICITOR GENERAL

ANALYTICAL STATEMENT

It is assumed that the Solicitor General, in writing his Memorandum for this Court, was speaking for, or as the direct result of contact with, someone at some level in the Department of Indian Affiairs. We say this respectfully but candidly because of the confusion engendered and created by the several things which our analytical consideration of the Memorandum discloses:

1. The obviously non-legal approach to the question of "rights" of the respective parties as distinguished from their personal "capacities";

2. The failure to distinguish between (a) want of "capacity" to sue and (b) the absence of possession of legal enforceability of a particular "right";

3. The failure to distinguish between (a) a statutory right granted to members of the Five Civilized Tribes and (b) the express denial of such a right by statute and regulations (having the force of statutes) to restricted members of the Comanche Tribe;

4. Complete disregard of procedural requirements under the code of civil procedure of the State of Oklahoma;

5. The failure to recognize that an action for damages for "waste" would be an action involving an interest in land and for injury to land and thus not maintainable in Oklahoma County, Oklahoma;

6. The assumption of a fact not shown by the record and at war with reality and law, *i.e.*, that the "Secretary" consented to the maintenance of the action by the restricted Indians;

7. Complete disregard of the requirement, plainly stated, for precedent use by the Indians of a valid and effective administrative remedy;

8. Complete disregard of the right of the respondent-lessee to comply with, obey and rely upon operations supervision by the "Supervisor" under the plain terms of the lease contract and of the Regulations;

9. Complete disregard of the required end-result of any litigation permitted in that it is now to be seen without doubt that plaintiffs could not recover any relief in this action; and

10. Complete disregard of the destructive effect upon governmental regulation of the affairs of the restricted Indians which the effective application of the Solicitor General's opinion and suggestion would inevitably bring about.

Brief statements contained in the Memorandum of the Solicitor General under appropriate headings and relating to the particular matters of discrimination above suggested will be set out hereinafter.

ARGUMENT AND AUTHORITIES

1. "Capacity to sue" and "right of enforcement" are not to be equated.

The Solicitor General suggests (S.G. Mem.)* that we would have the plaintiffs assigned to the category of "children," "insane" and wholly incompetent. Such could not be further from the truth. The Solicitor General confuses "capacity to sue" (S.G. Mem. 2, 3, 4) with "right to litigate" in the exercise of a particular judicial remedy. We merely assert and have asserted only that by the terms of the very contract sued on and the very law under which it came into existence and continues in force, the particular remedy sought to be used by plaintiffs is interdicted as to them.

The Supreme Court of Oklahoma was very careful to recognize the distinction here stressed, and contrary to the Solicitor General's assertion (S.G. Mem. 2) did not find,

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* NOTE: References herein are to (Pet. Cert.), Petition for Certiorari; (Br. Opp.), Brief in Opposition to Certiorari; (S.G. Mem.), Solocitor General's Memorandum; and (R.), the Record.

state or decide that plaintiffs "lacked capacity to sue," saying instead consistently that plaintiffs' "right to sue" on this contract and "right to prosecute" and "right to maintain" *this action* did not exist.

In this posture, the decisions in *Heckman* v. *United States,* 224 U.S. 413, 442-446 (1912), and *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F.2d 456 (10th Cir., 1951), upon which the Solicitor General places chief reliance (S.G. Mem. 3), do not support his conclusion. The very statutes and regulations applicable to the Comanches, including Petitioners here, expressly contradict the Solicitor General's conclusion that by the decision in *Heckman,* the "purpose" of the Government's control, "trusteeship" or "guardianship" is limited to preventing "improvident conveyances" (S.G. Mem. 2).

As pointed out (Pet. Cert. 7) and (Br. Opp. 7-8) the *Heckman* and *Sadler* cases involved lands of the Five Civilized Tribes, to which different specific statutes applicable only to members of those Tribes apply. The same is true of *Choctaw and Chickasaw Nations* v. *Seitz* which involved only a suit by Indian *Nations.* All three of these cases involved *title* to the lands themselves and in neither was involved enforcement by court action of a *contract* which (with the law supporting it) plainly required that it could be sued on only by the "trustee" or "guardian" itself. In addition, in the *Sadler* case, the United States actually intervened and prosecuted the claim.

Many decisions of this and other courts support the views here expressed. They are cited at pages 6 and 7 of Respondent's Brief in Opposition to Petition for a Writ

of Certiorari now on file herein, to which pages and citations we now respectfully refer.

We make no claim, and the Oklahoma courts did not hold, that the Indians were or are incapacitated to sue in a state court in a *proper* case upon a *proper* cause of action assertable by them. We are not in disagreement with the decisions relied upon by Petitioners. But it needs to be noted that those cases all deal with factual situations and claims entirely different from those in the case at bar. We make no distinctions between state and federal courts as to jurisdiction. The rules we contend for apply to whatever court of record in which the suit may have been filed. We do not claim that plaintiffs have no standing to appear as litigants. We simply say, as held by the Supreme Court of Oklahoma in the instant case and by Judge Kennamer in *Seber* v. *Spring Oil Co.*, 33 F.Supp. 805 (D.C., Okla. 1940), that these Petitioners are not the ones authorized by law and the contract which is the basis of the action to seek the relief. The law and the contract forbid it. Though such does exist here, it is not even necessary to recognize a distinction between a restricted Indian, as plaintiff, and an unrestricted non-Indian or white man, *under the same conditions*. If an unrestricted white man (and especially if at the time of suit he is under trusteeship or guardianship) had made a lease agreement containing all the covenants and provisions which the departmental lease in suit here contains (vesting complete discretion and control in another), the rule which we contend for would be equally applicable to him.

At this point, we suggest that it is significant to consider that under the provisions of the lease itself "royalties"

are to be paid only to the "Superintendent" and on oil, gas and hydrocarbon substances *"produced and saved"* and that "oil, and/or gas used by the lessee for development and operational purposes on said lease, * * * shall be 'royalty free'." [Par. 3(c), R., C-M. 11]

The distinctions above suggested and the effect of the lease provisions last above referred to will be further commented upon hereinafter.

2. If the judgment below is right for any reason, it must not be disturbed.

It is well established that if a judgment appealed from is right for any reason or upon any legal basis, it must be permitted to stand. *Witmer* v. *United States*, 96 F.2d 745, 746 (3rd Cir., 1938); *Hall* v. *Deal*, 205 Okla. 46, 234 P.2d 384, 389 (1951); *Wilson* v. *Berryhill*, 181 Okla. 213, 73 P.2d 449, 453 (1937).

The judgment of the trial court in the case at bar was affirmed by the Supreme Court of Oklahoma in its entirety. It was affirmed, not only for the reason that (1) plaintiffs had no right to prosecute or maintain the action because of their contract and the federal law applicable thereto, but also because (2) the pleadings disclosed that plaintiffs could not recover on the merits (a) because they were not the real parties in legal interest, and (b) defendant had done nothing in violation of the contract, and (c) there had not accrued any unpaid liability or obligation for the payment of "royalty" under the lease or otherwise (Appendix B to Petition, pp. iii, ix, x-xi; Syllabus 2 by the Supreme Court of Oklahoma).

Under the code of civil procedure of Oklahoma a "demurrer" raises every legal question arising out of and apparent from the face of the pleading which is dispositive of the case as far as the instant pleading is concerned. And if it appears as a matter of law that there can be no recovery upon the basis of such pleading or upon proper judicial notice, factually or legally, the demurrer must be sustained. A demurrer does not admit the truth of conclusions of law or statements of fact themselves disproved or rendered immaterial upon the face of the pleading or controlling exhibits. *Southern Surety Co.* v. *Municipal Excavator Co.*, 61 Okla. 215, 160 Pac. 617, 619 (1916); *Williams* v. *Phillips Petroleum Co.*, 406 P.2d 474, 477 (Okla. 1965); *Savage* v. *Woods*, 268 P.2d 858, 860 (Okla. 1954); *State ex rel Nesbitt, Attorney General* v. *Liberty National Bank and Trust Co.*, 414 P.2d 281, 284-285 (Okla. 1966); *Diehl* v. *Phillips Petroleum Co.*, 376 P.2d 203, 206 (Okla. 1962); *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 989-990 (1943).

And to like effect is a now authorized motion for summary judgment upon the whole record, Oklahoma Supreme Court Rule No. 13, which is substantially the same in its provisions as those in Federal Rules of Civil Procedure, Rule No. 56(a), (b), (c) and (e). Such Oklahoma Rule will be further referred to hereinafter.

Again, the Oklahoma code provides for limitations upon venue. While an action upon a simple contract, neither involving an interest in real property nor damage to land, is transitory and may be brought wherever the defendant may be properly served with process, an action in contract

or otherwise for recovery of damages to land or involving tortious or illegal use thereof must be brought in the county where the land lies. 12 O.S.A. 131 reads in part:

> "Actions for the following causes must be brought in the county in which the subject of the action is situated, * * *:
>
> "1st, For the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest.
>
> * * * * * *
>
> "5th, For all damages to land, crops, or improvements thereon, action must be brought in the county where the damage occurs."

—*Atchison, Topeka & Santa Fe R. Co.* v. *Superior Court of Creek County, Oklahoma,* 368 P.2d 475 (Okla. 1962);

Fox v. *Superior Court of Creek County, Oklahoma,* 368 P.2d 484 (Okla. 1962);

Ross v. *District Court of Oklahoma County, Oklahoma,* 199 Okla. 573, 188 P.2d 861 (1948);

McCully v. *McCully,* 184 Okla. 264, 86 P.2d 786 (1939);

Sinclair Prairie Oil Co. v. *District Court of Pottawatomie County, Oklahoma,* 180 Okla. 455, 70 P.2d 94 (1937).

Any contrary decisions by the Supreme Court of Oklahoma were prior to the 1957 amendment to 12 O.S.A. 131 which added paragraph 5th.

This explains the significance of the express limitation of this suit by counsel for the plaintiffs to one *on the contract* (Br. Opp. 3). Faced with a preliminary motion re-

quiring election, plaintiffs' counsel elected formally and conclusively to proceed *ex contractu* because they knew that an action for "waste" would have to be instituted, if at all, in Stephens County, Oklahoma, where the leased land was located and that in such case their pending suit in Oklahoma County would have to be dismissed for want of venue. In this connection, please bear in mind that the only action which could be brought upon the lease to recover "royalty" [Lease, par. 3(c); C-M. 11], was for a percentage of "oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased," specifically excepting oil and/or gas used by the lessee for development and operational purposes on the lease, "which oil or gas shall be 'royalty free.'" For unauthorized "waste" of gas, recovery by the Secretary was limited to 5¢ per 1,000 feet.

Thus, in speaking of an action for "waste" and to "protect their interests in allotted lands" (S.G. Mem. 1, 3 and 4), the Solicitor General failed to take account of this and failed to recognize that an action for "waste" was not really the type of action here involved, so his conclusion that this action could be maintained by the Indians flies in the face of mandatory provisions of the Oklahoma code which must be respected by this Court.

Another significant provision of the Oklahoma code to which the attention of the Solicitor General was not directed is that requiring the action to be prosecuted in the name of the real party in interest. 12 O.S.A. 221 reads in part:

> "Every action must be prosecuted in the name of the real party in interest, * * *."

The tests for application of the Statute, with citations of Oklahoma cases announcing them, are now briefly discussed.

A defendant has the right to have a cause of action prosecuted against him by all of the real parties in interest, and all parties united in interest as parties plaintiff in the subject matter of the litigation must be joined as plaintiff. *Haught* v. *Continental Oil Co.*, 192 Okla. 345, 136 P.2d 691 (1943); *Stinchcomb* v. *Patterson*, 66 Okla. 80, 167 Pac. 619 (1917).

The "real party in interest" in an action is the one legally entitled to take the proceeds of a claim in litigation. The test of whether one is the real party in interest is: Does he satisfy the call for the person who has the right to control and first receive the fruits of the litigation? *Johnson* v. *Harris*, 187 Okla. 239, 102 P.2d 940 (1940); *Okmulgee Coal Co.* v. *Hinton*, 95 Okla. 92, 218 Pac. 319 (1923); *Stinchcomb* v. *Patterson*, 66 Okla. 80, 167 Pac. 619 (1917); *Conley Drilling Company* v. *Rogers*, 191 Okla. 667, 132 P.2d 959 (1943); *Schoenfeld* v. *Blair*, 366 P.2d 414 (Okla. 1961).

Another test for determining whether or not an action has been brought and is being prosecuted by the real party in interest is whether a judgment for or against the plaintiff in the action would protect defendant from an action upon the same demand by another. *Moore* v. *Casing Brothers*, 202 Okla. 252, 212 P.2d 460 (1949); *American F. & C. Co.* v. *All American Bus Lines*, 179 F.2d 7 (10th Cir., 1949); *Joplin* v. *Ely*, 365 P.2d 735 (Okla. 1961).

3. No effective "consent" was or could have been given by the "Secretary" for the plaintiffs to maintain this suit.

The Solicitor General has probably been led into an unguarded assumption of "consent" by the "Secretary" to the maintenance of this action by the plaintiffs, Petitioners here (S.G. Mem. 2, 3, 4) by the inaccurate reference to "consent" by the Supreme Court of Oklahoma (Appendix B to Petition, p. xi) while specifically holding that there was no effective "consent." In truth, there was no consent by the Secretary or otherwise.

The "consent" (not now urged by Petitioners) referred to is found in a letter dated April 6, 1962 signed by "Will J. Pitner, Area Director," purporting to approve an attorney's contract between Houston Bus Hill and the Petitioners herein (R., C-M. 71, 65-70). It is to be noted that while this suit was instituted in the District Court of Oklahoma County, Oklahoma, on the 9th day of August, 1961, the letter referred to is dated nearly a year later and it does no more than to "approve" the attorney's contract upon conditional terms. The language of this co-called "approval" shows that it does not even purport to be an attempted consent by the Secretary of the Interior that the action may be maintained by the Indians in lieu of the United States or in lieu of the Secretary.

The so-called "approval" by Pitner says *only* that *if* the suit is maintained and *if* the suit is successful in that a recovery is had for the plaintiffs and *if* funds are then available, payment will be made by the Department upon a "quantum meruit" basis.

Thus, this was obviously not even an attempt to grant authority to sue nor an attempt to waive the Federal Gov-

ernment's exclusive rights reserved in the lease, in the law and in applicable regulations, and such was never intended. The effect of the letter is simply and solely to say that "if you do prosecute the action successfully and benefit the Indians, we will allow you to be paid a reasonable fee for what you have accomplished." While plaintiffs had the right to choose counsel and to contract with counsel for whatever purpose they wished, such choice of counsel did not and could not authorize the institution and maintenance by them of a cause of action which they otherwise were not legally entitled to maintain. And no approval of such choice could amount to such authority or to delegation of authority exclusively resting in the United States. In no event could such approval, *in the absence of formal removal of restrictions*, authorize counsel to be appointed by the Indians to appear for them nominally but in reality to represent the United States of America in an action which only it could bring.

The restrictions upon these Petitioners have never been removed. There is no indication of any kind of an intent, purpose or attempt to waive, modify, repeal, set aside, diminish, relinquish or release any of the restrictions imposed by the departmental lease and the regulations to permit the Indians to assert those rights vested exclusively in the Secretary of the Interior, or to have paid to the Indians any of the benefits of the lease or income or emoluments flowing therefrom or thereunder. If there had been any such intent, it would have been a simple matter to have expressly said so or to have brought about a "removal" of restrictions by the Secretary of the Interior. But neither was done.

Conditional agreement to pay a fee for services of an attorney, or even for that matter, conditional consent to employment of counsel for a case does not and cannot waive or change the established law of contract that the suit must be instituted and maintained by the party who can legally recover, who is legally entitled to receive the amount sued for and is thus the real party in interest.

Even if it had been the intent of the "Area Director" to authorize the plaintiffs to bring this suit, such would be wholly ineffective for at least three reasons: (1) The only legal way to have done so would have been under Lease, paragraph 6 (R., C-M. 11) of the lease by removal of restrictions, and (2) the letter of Will Pitner is without legal effect to change established law, the statutes of Oklahoma, the decisions of the Supreme Court of Oklahoma, the federal statutes and the rules and regulations of the Secretary of the Interior, or any of them, and (3) no officer or agent of the federal government not expressly authorized to do so can waive the exclusive rights of the United States to institute or not to institute litigation, and no officer of the United States can by *ex post facto* act, destroy, ignore or obliterate the accrued property rights of a party with whom it has dealt in good faith. The jealousy with which the courts guard the Government's exclusive right to submit questions (affecting rights of its Indian wards) to litigation is exemplified in *Minnesota* v. *United States,* 305 U.S. 382 (1939).

The Court's attention is specifically called to the following express language of Lease paragraph 6 referred to above to which the Indian lessors themselves *agreed.*

After reciting the exclusive control of the Secretary of the Interior before restrictions are removed, the paragraph terminates with the following language:

> "Provided, that after restrictions are removed the lessor shall have and be entitled to any available remedy in law or in equity for breach of this lease by the lessee."

Thus, even if there had been an express, unambiguous "consent," this could not change the contract nor the law established with respect to it so as to divest the Secretary of the Interior of the cause of action which rested solely in him or in the United States under his direction. And certainly, it will not be presumed that *after the fact* the Government of the United States through its Secretary of the Interior would breach its contract with the respondent-lessee, Skelly Oil Company, by affirmatively permitting an action to be brought which both the Secretary and the Indians had agreed would not be brought, and that based upon a claim arising from full and complete performance of the contract under the controlling directions of the Secretary of the Interior. Only the Secretary of the Interior had the right to determine the affirmative as well as the negative, *i.e.*, whether (1) the United States would institute an action against the respondent, or (2) would not do so, and it has obviously determined upon the negative.

The Supreme Court of Oklahoma was entirely right in holding and deciding that effective consent to the institution of this action by the Indians themselves had not been given.

4. Requirement for exercise of administrative remedy may not be ignored.

It is strikingly significant that the Solicitor General's Memorandum takes no cognizance at all of the administrative remedy expressly afforded to the Indians through and by means of which they could and were required to seek the very relief which they now demand, and *through this means* reach the judicial review stage, if that should prove necessary. The nature and course of such a remedy is fairly exemplified in *California Co.* v. *Seaton, Secretary of the Interior*, 187 F.Supp. 445 (D.C., D.C. 1960).

The provisions for this remedy in the regulations of the Secretary are set out on page 12 of our Brief in Opposition to Certiorari as are the citations of authorities indicating that these provisions and this remedy cannot be ignored and are required precedent to access to the courts by the Lessor-Indians.

We respectfully urge the Court to consider those pages and citations in connection with the Solicitor General's Memorandum.

5. Compulsory compliance by Lessee with operational requirements of "Secretary" clothed Lessee with protection against adverse claims of Indian wards growing out of such compliance.

At pages 3 and 4 of his Memorandum appears this statement by the Solicitor General:

> "In the present case, the terms of the lease relating to waste, when read against the pertinent rules of the Secretary, clearly vest in his subordinates broad discretion and control over the lessee's operations (see

Br. in Opp., App. pp. iii, vii-viii). If the lessee fails to operate in conformity with the directions of the federal supervisors and waste results, the Secretary will, of course, be quick to institute his own action to enforce the lease; his standing to do so is established by *Heckman* v. *United States, supra. If the lessee does comply, as was believed by the responsible officials of the Department of the Interior to be the case here,* the likelihood of a successful suit by the Indian lessor charging violation of the lease is plainly remote; accordingly, such suits are rarely brought. But should the Indian disagree with the federal supervisors and believe the lease was violated, the Secretary will normally, as here, consent to the Indian's bringing his own suit." (Italics supplied.)

As inherent in the action of the trial court and as expressly stated by the Supreme Court of Oklahoma, there is here no charge that the Lessee, Skelly Oil Company, failed, neglected or refused to operate the lease in conformity with directions of the federal supervisors and, stated in accord with the belief of "the responsible officials of the Department of the Interior," it actually did comply with such directions, the United States having determined not to sue and having refused an invitation to come in and take this case over.

Conceded that this lessee contracted in good faith with the Indian-lessors and the Secretary of the Interior, and thus with the United States, that it would comply exclusively with the directions of the supervisory officials of the Department in the operations of the lease, in return for which it was given assurance that if it did so, it would be free of interference and litigation by the Indian-lessors

as long as the Secretary had not removed restrictions upon the Indians, what kind of law would it be which would say that notwithstanding, the Indian-lessors, being still restricted, may "disagree" with the decisions and directions of said supervisors *after compliance therewith* and seek to recover damages or whatnot from the lessee for doing that which the supervisors had approved and/or directed? Would such not be an impairment of the obligation of contract? Would such be either moral or just?

Would it not be a form of judicial or legal oppression to adhere to and enforce a pronouncement that even though it is clear from the pleadings that a party cannot succeed, he must be afforded an opportunity by a trial to secure a favorable judgment which would run afoul of the law, or at least needlessly and futilely punish an innocent adversary by requiring a defense at great cost and expense?

In connection with the above, please see *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 338 (9th Cir., 1956), and *United States* v. *Barnsdall Oil Company*, 127 F.2d 1019 (10th Cir., 1942), with other cases cited at pages 10-11 of Respondent's Brief in Opposition to Certiorari.

More than this, it would be a futile and useless thing to grant certiorari or to reverse the judgment herein since under the above authorities it could only terminate in the same end-result. A summary judgment on the merits, under Oklahoma Supreme Court Rule No. 13, would have to be entered based upon the supervisor's approval and his testimony now of record in the cause by his deposition given pursuant to the Secretary's consent.

6. Permitting maintenance of this suit to possible recovery against the Lessee would set a precedent resulting in destruction of governmental regulation.

The Solicitor General says, as quoted above, that the normal policy of the Secretary is to consent to the Indian's bringing suit if he "disagrees" with the Department's previous decisions.

Under an announced and effective policy such as this what lessee would be willing to enter into a departmental lease? Such lease would require it to abide by the regulations, follow directions of the supervisor and/or operate with his approval, knowing that if the restricted Indian "disagreed," for any reason, after accomplishment, the lessee could be and probably would be sued by the Indian-lessor. This would be so even though what had been done was not the result of the lessee's own choice or judgment. In each case, in each instance, and in any event the lessee would be required to protect itself by insistence upon formal concurrence by the lessor in every decision made by the supervisor. How could a lessee operate otherwise to protect itself against the clear and ever constant hazard?

As in this case, (1) where there was no market for the gas, (2) adjoining oil wells were and would be draining oil from the Indians' lands unless produced from the Aitson lease, and (3) the only way to produce it was by the gas pressure and flow, and (4) where by flaring the gas large sums of oil royalty money were secured and paid to the Superintendent for the benefit of the Indians (which would not have been otherwise paid or obtained), and (5) this with the approval and concurrence of the supervisor, can

the restricted Indian-Lessors "disagree" with the supervisor and sue the lessee for that gas which was necessarily used *on the lease* for the benefit of the lessor?

If the answer to the last question propounded should be in the affirmative, the whole elaborate scheme of guardianship and regulation for the restricted Indian ward in connection with leasing of his mineral interests is doomed. Every decision and direction of the supervisors could be challenged and nullified and it is certain that each unprofitable or ill-advised one would be. No lessee could operate under such a policy.

CONCLUSION

It is urged that for the many reasons set forth above the suggestions of the Solicitor General are neither based upon adequate legal support nor upon adequate consideration of all present factual, legal and historical factors. We maintain that review upon certiorari is not called for and that the pending application for the Writ should be denied.

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July, 1967

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,

Petitioners,

VERSUS

SKELLY OIL COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF PETITIONERS

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November, 1967

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BRIEF OF PETITIONERS

OPINION BELOW

The opinion and judgment of the trial court and the Oklahoma Supreme Court are printed in Appendix (A. 46-48, 61-69).[1]

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Oklahoma was entered on May 24, 1966 (A. 61-69). A petition for rehearing was timely filed on July 8, 1966, and denied December 20, 1966 (A. 73). An application

[1] Legend to References: To appendix this brief (brief app. .....); To Appendix of Record (A. .....).

for second petition for rehearing was denied January 31, 1967. The jurisdiction of the Court is invoked under Title 28 U.S.C.A. Section 1257(2)(3) and Rule 19 of the Supreme Court of the United States. The petitioners have exhausted all of their state court remedies. The constitutional and federal questions were presented to the Supreme Court of the State of Oklahoma in the petition for rehearing (A. 71-72), such constitutional and federal questions first arising herein on May 24, 1966, when the opinion and judgment of the Supreme Court of the State of Oklahoma was rendered and entered herein. Timely Notice of Appeal filed and served (A. 75-78). Petition for Certiorari filed March 17, 1967.

CONSTITUTION, STATUTES AND FEDERAL REGULATIONS INVOLVED

Constitution

The Constitution of the State of Oklahoma, Article 1, Section 1:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Constitution of the United States, 5th Amendment:

> "No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment:

"Nor shall any state deprive any person of life, liberty, or property without due process of law."

Statutes

General Allotment Act, February 8, 1887, 24 Stat. 388, 25 U.S.C. 331 et. seq. (Relevant provisions, 25 U.S.C. Sections 345, 347, 348 and 396 [brief app. iii, iv, v, vi].)

Federal Regulations

7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, in part. (Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63, and 221.60 [brief app. i-ii].)

Title 25, C.F.R. Section 172.23 (brief app. ii).

Title 30, Chapter 11, C.F.R. Section 221.35 (brief app. iii).

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Oklahoma in its opinion and judgment of May 24, 1966, erroneously construed the terms and provisions of the Departmental Oil and Gas Mining Lease of Restricted Lands of the Indian petitioners herein, and federal regulations pertaining thereto, *viz.*, 7 F.R. 1433-4135-4140 and Title 30, Code of Federal Regulations (C.F.R.) January 1966 Revision, Section 221.3, 221.4, 221.18, 221.21, 221.62, 221.63 and 221.60 and Title 25 C.F.R. Section 172.23?

2. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein is in conflict with applicable decisions of this Court?

3. Whether the laws of the United States providing for Departmental Oil and Gas Mining Leases upon restricted lands of Indian petitioners, and all federal regulations pertaining thereto are for the protection of Indian petitioners, as lessors, and whether such federal regulations can be interposed by respondent lessee herein to avoid liability for damages resulting from breach of express and implied covenants of such oil and gas mining lease?

4. Whether Indian petitioners, as lessors in a Departmental Oil and Gas Mining Lease on restricted lands, can institute and maintain this action for damages for waste of natural gas by lessee in violation of the express and implied covenants of said lease contract, after due and proper notice has been given the United States, as by law provided, and the United States has elected not to enter such case in behalf of Indian lessors, petitioners herein?

5. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma herein, in denying petitioners (Indian lessors) the right to institute and maintain this action against respondent (lessee) for damages for waste of natural gas by respondent in violation of express and implied covenants of Departmental Oil and Gas Mining Lease, when the United States after due notice elected not to enter into this case, violates and offends the rights of petitioners herein under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States and deprives petitioners of their property and rights without due process of law?

STATEMENT OF THE CASE

On August 9, 1961, petitioners filed suit against respondent for damages alleging respondents breached express and implied covenants of a Departmental Oil and Gas Mining Lease upon the restricted Indian lands of petitioners who are Comanche Indians, by wasting natural gas from leased lands. Petitioners are lessors in said lease and respondent is lessee therein (A. 5-11). Notice was given the United States (A. 20-23).

Respondent interposed a demurrer to petitioners' Amended Petition and the trial court sustained its demurrer, and entered judgment against petitioners (A. 46-48). An appeal was perfected to the Supreme Court of Oklahoma, and on May 24, 1966, an opinion and judgment of the Supreme Court of Oklahoma was entered affirming the judgment of the trial court (A. 61-69). Petitioners filed a timely petition for rehearing, which was denied on December 20, 1966 (A. 73). An application for second petition for rehearing was denied on January 31, 1967.

Notice of Petition for Certiorari and Appeal was filed and served upon respondent on February 1, 1967 (A. 75-78). Petition for Certiorari filed March 17, 1967. Certiorari granted October 9, 1967.

SUMMARY OF ARGUMENT

A. Indian petitioners, as owners of the land involved, and as lessors in the Departmental Oil and Gas Mining Lease, have a right to bring this action against respondent, as lessee, seeking damages for alleged breach of the express and implied covenants of said lease. The fact petitioners are

Indians and the land is subject to federal regulations does not destroy their right to so sue. This right of Indians has been recognized both by federal legislation and in court decisions. After due notice, as given herein, the United States may elect to enter the case, but if the United States does not elect to enter the case, the Indians alone can maintain such litigation to a conclusion.

B. Nothing is contained in federal regulations, or in the lease itself, which prevents or precludes petitioners, as Indian lessors, from bringing and maintaining this suit. In fact the federal regulations are a shield for the protection of the interests of American Indian citizens, and are not to be construed as a sword by which respondent lessee herein can prevent Indian petitioners from seeking, by court action, to reap the benefits of their heritage.

C. The decision of the Oklahoma Supreme Court herein is unsound, and should be reversed.

BRIEF AND ARGUMENT

Petitioners, who are Comanche Indians, are lessors in a Departmental Oil and Gas Mining Lease and respondent is lessee. The lease was approved by the Secretary of the Interior. Respondent drilled seven (7) producing oil and gas wells on the lands involved and permitted great quantities of gas to escape and flare from said wells, notwithstanding a pipeline affording a market for said gas was located within one-half (½) mile of the producing wells. Petitioners filed suit for money damages, alleging (A. 40, 41):

". . . That said defendant failed and refused to market said gas, and in addition thereto failed and

> refused to exercise reasonable diligence in the prevention of waste of the gas produced and developed from said land and preserve said oil and gas producing properties as is required by said oil and gas lease. That defendant wrongfully permitted gas to flare and escape from said wells, as aforesaid, and has illegally committed waste in the premises in direct violation of the express terms, conditions, and covenants of the aforesaid oil and gas mining lease, which is attached to the original petition herein marked Exhibit 'A', and made a part of this amended petition by reference."

Notice was given the United States (A. 20). It was alleged that the United States authorized petitioners to employ counsel and consented to the filing of this action (A. 41).

The trial court sustained a Demurrer and dismissed the action (A. 46-48), and the Oklahoma Supreme Court affirmed (A. 61-69). A Demurrer, under the law of Oklahoma, admits the truth of all allegations, and reasonable inferences to be drawn therefrom. *Farmers and Merchants Nat'l Bank* v. *Lee*, 192 Okla. 9, 132 P.2d 931.

Under Oklahoma law a lessee in an oil and gas lease is liable in damages for waste, and failure to market gas produced. *Junction Oil & Gas Co.* v. *Pratt*, 99 Okla. 14, 225 Pac. 717; *North American Petroleum Co.* v. *Knight* (Okla.), 321 P.2d 964.

The crucial question in this case is whether the Indian petitioners have legal capacity to institute and maintain this action, after due notice is given the United States, or whether such an action can only be brought and maintained by the United States.

In *Heckman* v. *United States,* 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820, this Court determined a restricted Indian allottee could sue in his own behalf subject to the right of the United States to intervene. In *Heckman* it is said (224 U.S. 446, 56 L.Ed. 833):

> ". . . In what cases the United States will undertake to represent Indian owners of restricted lands of this sort is left, under the Acts of Congress, to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct, as in the Tiger case. . . ."

In *Sadler* v. *Public National Bank & Trust Co.*, 172 F.2d 874, the Court of Appeals for the Tenth Circuit held squarely that a restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. The only difference between an Indian in such case as this, and other litigants, is that when such an Indian files suit notice must be served upon the United States, which notice was served in this case.

The *Heckman* and *Sadler* cases involved restricted Indians of the Five Civilized Tribes, and petitioners here are Comanche Indians, but we submit the principle is identical. These cases establish clearly that an Indian lessor in a Departmental Oil and Gas Lease, as well as the United States, has the capacity to sue relative to causes of action arising from breach of covenants of such a lease.

The oil and gas lease involved herein covers land which petitioners hold under trust patents. Petitioners acquired their property under the General Allotment Act, February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. 331,

et seq. Section 5 of the Act, in part, 25 U.S.C. 348 (brief app. v) provides ". . . that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . .," or his heirs. As that provision permits, the twenty-five year period has been repeatedly extended by order of the President and the trust continues at this date.

The General Allotment Act expressly authorized suits by Indians against the United States to establish entitlements to allotments, 25 U.S.C. 345 (brief app. iii-iv), and adverts to ". . . actions brought in any State court or United States court by any patentee . . . for the possession or rents or profits of . . ." lands under trust patent. 25 U.S.C. 347 (brief app. iv).

The purpose of the trust and restrictions was and is to prevent improvident conveyances of allotted lands. These restrictions are for the protection of the Indian allottees, and, of course, are not to prevent the Indian from developing the resources of the lands, and deny him to reap the fruits and benefits of any development thereof by the lessee in any approved Departmental Oil and Gas Mining Lease.

The Indian allottee is expressly authorized to make an oil and gas mining lease, with the consent of, and under the rules prescribed by, the Secretary of the Interior for the Indian's benefit and protection. 25 U.S.C. 396 (brief app. v-vi). It follows that a suit by the Indian to enforce a legal right under such a lease so as to enhance his benefits thereunder is in accord with the purposes of the Act.

Particularly so in this action, which is a suit of this character for damages against respondent and the Secretary consented to its institution.

We submit that the United States, by the General Allotment Act (and other statutes pertaining to the Five Civilized Tribes) established certain protective restrictions against alienation for the benefit and protection of American Indians, but such restrictions do not disable or prevent such Indians from endeavoring to enforce and protect their interests in allotted lands by legal proceedings. *Heckman* v. *U. S., supra*; *Sadler* v. *Public National Bank and Trust Co., supra*; *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456 (C.A. 10); *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 39 S.Ct. 185, 63 L.Ed. 504; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553; 23 S.Ct. 216, 47 L.Ed. 299; *Creek Nation* v. *U. S.*, 318 U.S. 629, 640, 63 S.Ct. 784, 87 L.Ed. 1046; *U. S.* v. *Candelaria*, 271 U.S. 432, 443, 444, 46 S.Ct. 561, 563, 70 L.Ed. 1023.

The Oklahoma Supreme Court in its opinion and decision herein (A. 61-69) held that only the United States could sue to enforce petitioners' rights under the oil and gas lease involved. We submit this decision is unsound and in conflict with *Heckman, Sadler and Seitz*. Also it is clearly against the very purpose of the Federal Legislation, namely, the policy of restrictions is for the protection of the rights of the Indians, not for the destruction of his benefits.

The rules and regulations promulgated by the Secretary of the Interior, set out in the Oklahoma Supreme Court opinion (brief app. i-ii), are clearly rules and regulations for the benefit of the Indian lessor. The state court's de-

cision is a strained construction of these rules and regulations and, we submit, is unsound. Actually, the regulation most apropos to the inquiry in this case is Title 30, Chapter 11, C.F.R., Section 221.35 (brief app. iii) which specifically pertains to waste prevention of oil and gas by such a lessee as respondent. The Oklahoma Supreme Court did not refer to Section 221.35 in its decision. Under this regulation it is specifically provided that a lessee (respondent) shall pay lessor (petitioners) the full value of all gas wasted by blowing, release, escape, or otherwise unless determined to be sanctioned by the laws of the United States and of the State in which it occurs.

In our suit we allege that respondent wrongfully permitted gas to flare and escape and illegally committed waste to the damage of the Indian lessors in the amount of $114,000.00. The demurrer admits the truth of these averments. Nevertheless, we submit the State Court decision, instead of construing the above statutes and regulations for the benefit and protection of the Indian lessors, has ruled the same to be a sword by which the respondent lessee can prevent the Indians from attempting to enforce and protect their interests in allotted lands by legal proceedings.

The foregoing authorities, we submit, show clearly that the Indian petitioners have a right to bring this action in the state courts of Oklahoma, and after due notice to the United States and its election not to intervene therein, such Indian petitioners have a legal right to maintain this action. Consequently, the Oklahoma Supreme Court, by its opinion and decision herein deprived Indian petitioners of their property, and property rights, without due process of law; contrary to the Fourteenth (14th) Amendment.

Scott v. *McNeal,* 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896; *Ex parte Virginia,* 100 U.S. 339, 346-347, 25 L.Ed. 676, 679, 680; *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 697.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the opinion and decision of the Oklahoma Supreme Court in this action deprives petitioners of their property and property rights without due process of law contrary to the Fourteenth (14th) Amendment to the Constitution of the United States, and such opinion and decision should be reversed by this Honorable Court.

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November, 1967

APPENDIX

Title 30, C.F.R., 1966 Revision, in part:

(§221.3) "Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in the amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or non-compliance with duties by the lessee and, in general, all operations subject to the regulations in this part are under the jurisdiction of the supervisor for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts * * *."

(§221.4) "The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law * * *."

[APPENDIX]

(§221.18) "The lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, . . . * * *."

(§221.21) "The lessee shall drill diligently, and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor * * *."

(§221.62) "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor * * *."

(§221.63) "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

(§221.60) "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor * * *."

Title 25, C.F.R., Sec. 172.23 provides in part:

"(A) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated * * *."

Title 30, Chapter 11, C.F.R.:

"§ 221.35 Waste prevention: beneficial use.

"The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market or return it to the productive formation. If waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise at a price not less than 5 cents for each 1,000 cubic feet, unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of value and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Title 25, U.S.C., Section 345:

"§ 345. Actions for allotments

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to

any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided,* That the right of appeal shall be allowed to either party as in other cases. Aug. 15, 1894, c. 290, § 1, 28 Stat. 305; Feb. 6, 1901, c. 217, § 1, 31 Stat. 760; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Title 25, U.S.C., Sec. 347:

"§ 347. Limitations of actions for lands patented in severalty under treaties

"In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to other than members of any tribe of Indians. May 31, 1902, c. 946, § 1, 32 Stat. 284."

Title 25, U.S.C., Section 348 in part:

"§ 348. Patents to be held in trust; descent and partition

"Upon the approval of the allotments provided for in sections 331-334 of this title, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. . . ."

Title 25, U.S.C., Section 396:

"§ 396. Leases of allotted lands for mining purposes

"All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: *Provided,* That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified

bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale. Mar. 3, 1909, c. 263, 35 Stat. 783; Aug. 9, 1955, c. 615, § 3, 69 Stat. 540.

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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRANK POAFPYBITTY, ET AL., PETITIONERS

v.

SKELLY OIL COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
J. EDWARD WILLIAMS,
Acting Assistant Attorney General,
ROGER P. MARQUIS,
Attorney,
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Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Respondent obtained an oil and gas lease of certain Oklahoma land which petitioners, all of whom are American Indians, hold under trust patents issued by the United States. Some time after producing wells were brought in, petitioners brought a damage action against respondent in a State court, alleging that respondent had failed to exercise reasonable diligence to prevent the waste of gas produced under the lease, in violation of the terms thereof, and had thereby impaired petitioners' royalties. The Oklahoma Supreme Court sustained dismissal of the complaint on the ground that only the United States could sue to enforce petitioners' rights under the lease, and that peti-

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tioners thus lacked capacity to bring such an action (App. 61–69). At the Court's invitation, we expressed the view that that holding was unsound. Ceritorari was granted on October 9, 1967.

We submit this additional memorandum because, although any financial interest of the United States in the outcome of this case is remote,[1] the government has a special responsibility to prevent discrimination against its Indian wards and to vindicate their rights, procedural as well as substantive. In our view, the decision below unduly restricts the right of the Indians to seek judicial relief for claimed injury to their property rights and thereby improperly abridges their right of ownership.

A. *Petitioners have standing to institute this action.* Petitioners hold trust patents to the land here in question under the General Allotment Act of 1887 (24 Stat. 388, as amended, 25 U.S.C. 331 *et seq.*) and, in May 1947, executed an oil and gas lease to respondent on the form prescribed by the Department of the Interior (App. 1–2). The General Allotment Act provides for the issuance of trust patents on reservation lands suitable for farming to individual Indians, stipulating that the government holds the land in trust for the "sole use and benefit" of the allottees for a 25-year period, subject to possible extensions. 25 U.S.C. 348. By presidential order, the trust period has repeatedly

[1] Government liability might exist only if the dismissal of petitioners' present suit were affirmed, if, in a new action, petitioners were able to prove a case on the merits, and if they were further able to prove arbitrary and capricious action by administrative officials in the failure to bring suit in the name of the United States to enforce their damage claim.

been extended. The trust was imposed to prevent improvident alienations of the property by the Indians, who were the beneficial owners and who were authorized to use or lease the lands, subject to federal supervision.[2] Lease of such lands for mining purposes "by said allottee" is expressly authorized. 25 U.S.C. 396. Although the approval of the Secretary of the Interior is required, he is not the lessor and he cannot grant a lease on his own authority—except only in cases where heirs have not been determined or cannot be found (*ibid.*). Thus, the trust is not like a common-law guardianship or technical trust in which the guardian or trustee takes all action with respect to the property. As the Court of Appeals for the Ninth Circuit has observed: "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560.

As one would expect, those who can act for themselves can also sue on their own. The standing of allottees to maintain a suit is recognized in 25 U.S.C. 345, authorizing proceedings against the United States to establish the right to an allotment, and in 25 U.S.C. 347, providing that State statutes of limitations applicable to others apply in State or federal court actions

[2] In other instances, the same result is accomplished by issuance of fee patents containing restrictions upon alienation. The substantive result is the same, whichever method is used. See *Minnesota* v. *United States*, 305 U.S. 382, 389.

brought by allottees for possession, rents or profits of lands patented.[3] Accordingly, the courts have consistently recognized the right of Indians to institute judicial proceedings to protect their allotments. In *Heckman* v. *United States*, 224 U.S. 413, 445–446, in discussing the capacity of the United States to sue as to restricted Indian lands, this Court assumed that allottees could bring suits in their own right. And, more recently, in *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F. 2d 456, 460, the Court of Appeals for the Tenth Circuit concluded that prior decisions of this Court had established "the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party." Accord, *Skokomish Indian Tribe* v. *France*, *supra*, 269 F. 2d at 560.[4]

It is no answer to say that an action like the present one may be instituted by the United States on behalf of the Indians. See *Heckman* v. *United States*,

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[3] See, also, Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240, which provided a machinery whereby a party to a suit in which an Indian allottee was involved could cause the United States to be bound by serving notice of the action on the local Indian superintendent. While this particular statute applies only to the Five Civilized Tribes and, hence, is inapplicable here, it reflects the same legislative approach.

[4] While the *Seitz* and *France* cases involved Indian tribes, rather than individual Indians, this circumstance is unimportant. The discussion in *Seitz* applies equally to tribes or individuals, and the primary authority cited, the *Heckman* case, in fact involved individual Indians. See generally *Federal Indian Law*, 333–336 (G.P.O. 1958), which states (*id.* at 336): "[T]he rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands are clearly recognized, although the United States might not be bound by a judgment in such an action to which it was not a party."

supra. Indeed, there are many situations in which either the government or the private party immediately injured can initiate comparable suits. Civil antitrust litigation (see 15 U.S.C. 9, 15, 15a) and actions under the modern civil rights laws (*e.g.*, 42 U.S.C. 1971 (c), (d); 42 U.S.C. 2000e–5(e), 2000e–6) are sufficient examples. An even closer analogy is perhaps to be found in proceedings to vindicate the immunities of military personnel which may be initiated by the individual soldier (*e.g., California* v. *Buzard,* 382 U.S. 386) or by the United States in its own name (*e.g., United States* v. *Arlington County,* 326 F. 2d 929 (C.A. 4). Doubtless, in most circumstances where the rights of Indians are involved, the government can be counted on to file the necessary court action. But the right to sue—where it exists—should not be made to depend on the good judgment or zeal of government attorneys.

To be sure, the rule allowing an allottee to sue individually, without joining the United States, may theoretically expose the defendant to two suits, one by the Indian complainant and a second by the government.[5] But the risk is not very real since the private suit will usually eventuate only after the government has declined to file court proceedings. Moreover, it would be a rare case which the United States determined to relitigate in its own name. At all events, however, exposure to a second suit by the government

[5] That possibility is eliminated when the original action is filed by the government, because the United States is deemed to be asserting both its own interest and that of its Indian ward. See *Heckman* v. *United States, supra,* 224 U.S. at 444–445.

exists in other contexts—for instance under the anti-trust laws (see *United States* v. *Borden Co.*, 347 U.S. 514, 517, 520)—and has not been thought such an obstacle here as to justify denying Indians the right to sue alone. See *Choctaw and Chickasaw Nations* v. *Seitz, supra,* 193 F. 2d at 460–461; *Skokomish Indian Tribe* v. *France, supra,* 269 F. 2d at 560.

We conclude that the existence of federal control and supervision over allotted Indian property does not preclude the Indian landowners, like other property owners, from maintaining suits appropriate to the protection of their property rights.[6]

B. *Neither the oil and gas leasing regulations nor the lease terms preclude maintenance of an action by petitioners.* The United States has exercised its supervisory authority over the matter of oil and gas leasing in considerable detail. The critical fact, however, is that the Indian land-owners, not the United States, are the lessors here. If the lessee has conformed to all the requirements of the federal supervisor and has not committed any breach of the lease terms, the suit may fail; but that cannot defeat the capacity of the lessors to maintain an action.[7]

To be sure, the pertinent regulations empower the Secretary to cancel a lease for good cause "upon application of the lessor or lessee" or on his own motion.

[6] By Act of June 2, 1924, 43 Stat. 253, now 8 U.S.C. 1401 (a)(2), all native-born Indians are citizens.

[7] We express no view on the State-law issues regarding the proper form of actions, venue, or other procedural matters about which respondent argued at length in opposing certiorari (Reply Br. pp. 6–10). In light of the grounds upon which the holding below was based, it is unnecessary, at this juncture, to reach such issues.

25 C.F.R. 172.23. Yet, that does not purport to constitute the exclusive remedy available to lessors. Indeed, it would be remarkable if the severe sanction of cancellation were the only relief for all breaches of lease terms, or for any failure to pay rentals or royalties. Petitioner sought damages, not an administrative remedy. Accordingly, this case is not governed by the regulations—which provide only for relief at the hands of the Secretary.

Nor is the question resolved by the terms of the lease itself. Respondent invokes Section 6 of the lease, which provides that the Secretary may cancel "before restrictions are removed," and concludes, "Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee" (App. 7). There is no warrant, we submit, for implying by negative inference from this proviso a denial of any, or all, remedies otherwise existing prior to removal of government restrictions. The thrust of Section 6 is, rather, that after the restrictions are removed the Secretary will no longer have authority to cancel the lease. The proviso, fairly read, merely adverts to those remedies that will survive the termination of federal supervision because they have an independent source.

In sum, respondent's contention that, until the trusteeship is ended, the Indian landowners are disabled from maintaining suit for breach of a lease they have granted of their own property is unsupported in the governing statutes, the implementing regulations, or the terms of the lease.

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In the

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OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY.
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT, SKELLY OIL COMPANY (Including Answer to Amicus Curiae Brief)

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CONCLUSION

The judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted.

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In the
Supreme Court of the United States
OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY.
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT, SKELLY OIL COMPANY
(Including Answer to Amicus Curiae Brief)

REFERENCE DESIGNATIONS

In this Brief Petitioners will be sometimes designated and referred to as "plaintiffs" and the Respondent will likewise be referred to as "defendant" or "Skelly." By the term "United States," we designate and refer to the Government of the United States of America, its Secretary of the Interior and its Commissioner of Indian Affairs and their "Superintendent" and The United States Geological Survey and its "Supervisor." Reference abbreviations in this Brief are: (App. —) to the printed Appendix; (Pet. Br. —) to Petitioners' Brief; (Am. Br. —) to the Amicus Curiae Brief of the United States.

I. NATURE OF THE CASE

Because Petitioners did not adequately do so we must state the case.

This is an action *in contract* (App. 1, 17, 18, 41) instituted in the District Court of Oklahoma County, Oklahoma, by the above named plaintiffs, Comanche Indian heirs of Ma-Rah-Wad-Di, Comanche 2660, who died owning restricted lands in Stephens County, Oklahoma. The action sought to recover (App. 3, 4) a money judgment in the amount of One Hundred Fourteen Thousand and No/100 ($114,000.00) Dollars representative of the "royalty" (App. 18-19, 41) alleged to be due upon casinghead gas asserted by plaintiffs to have been "flared" into the air and not "marketed." The land is designated as:

> Southeast Quarter (SE¼) of Section Three (3), Township Two North (2N), Range Eight West (8W) in Stephens County, Oklahoma.

In the hands of the named heirs the land was and is federally restricted, subject only to alienation or leasing by and with the consent and approval of the Secretary of the Interior of the United States and subject only to leasing upon a "Departmental Lease." The lease referred to in this action is known and commonly referred to as "The Aitson Lease." The land was leased to Skelly by and upon a Departmental Lease, a copy of which is attached to plaintiffs' original Petition (App. 5-11). The only issue (App. 18-19) tendered by plaintiffs in the case was and is whether the defendant, under the contract, owes the amount of the stipulated royalties upon and for casinghead gas which was produced but not marketed.

The various statements (Pet. Br. 4, 5, 7, 10, 11) contained in the briefs filed here by the petitioners and by Amicus Curiae (Am. Br. 1, 2, 4, 6) to the effect that this was an action "for damages to the leasehold estate" and "for damages by reason of alleged waste of gas" and for tortious and negligent injury to the freehold, are erroneous and are not justified. It is clear from the record that this is an action where plaintiffs seek to recover *upon the contract* the amount, to be mathematically determined, of royalties due under the terms of the contract for casinghead gas "produced" by the defendant as lessee in an existing lease but which gas was not "marketed" by said lessee. This is plainly, patently and unmistakably the nature of the case.

1. At page 17 of the Appendix appears a motion filed in the court below to require the plaintiffs to elect whether they will proceed upon the contract or upon tort. At page 18 appears the "Journal Entry" covering the order made by the trial court upon this motion which *by agreement of the parties,* strikes from the Petition the allegation that defendant violated the conservation statutes of the State of Oklahoma and denies defendant's motion to require an election upon the following recited commitment of plaintiffs' counsel to the court:

> "2. Upon announcement of plaintiffs' counsel to the Court that with said language aforesaid stricken from said Petition only one cause of action is stated, presented by or intended to be asserted in and by said Petition *and that only recovery in contract will be sought in this action by plaintiffs,* the motion of the defendant to require election as between two separate causes of action is overruled and denied and likewise the alternative Motion of said defendant to require

separate statement and numbering of separate causes of action is overruled and denied upon the same basis and for the same reason;". (Emphasis ours.)

2. In the Amended Petition (App. 41), the plaintiffs say that "plaintiffs have been damaged in the loss of royalty, * * * in the amount of One Hundred Fourteen Thousand and No/100 ($114,000.00) Dollars."

3. As pointed out hereinafter, there would not have existed and there did not and will not exist any venue in Oklahoma County, Oklahoma, for an action to recover damages to the property of the plaintiffs, to-wit: the land and leasehold estate of plaintiffs. Venue for this was exclusively in Stephens County, Oklahoma (App. 44, 45). See 12 O.S.A. 131, *infra*. Plaintiffs chose the Oklahoma County forum rather than Stephens County or the United States District Court.

The true and only question was and is therefore: What were and are the rights, duties and obligations of the parties *under the lease* as that lease is regulated, controlled and extended by applicable statutes and regulations promulgated by the United States which, *under the contract* and under existing law, may alone enforce these obligations by recovery of amounts said to be due under the contract? In light of the argument of the Solicitor General in his Amicus Curiae Brief, these are particularly important matters.

II. POINTS RAISED BY THE DEMURRER

The Demurrer of the defendant (App. 44), as sustained by the trial court, was directed to the Amended Petition of the plaintiffs (App. 39). It raised, primarily and essentially, three (3) major points.

1. *The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.*

2. *Even assuming, arguendo, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition, do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.*

3. *Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in this Court.*

III. STATEMENT OF THE CASE—THE RECORD.

1. The Amended Petition and the Lease.

(1) The Amended Petition.—This Petition (App. 39) was substantially the same as the original Petition (App. 1) after a portion thereof was stricken by agreement (App. 18) and to which the trial court had previously sustained demurrer (App. 37). The Amended Petition incorporated by reference (App. 40) Exhibit A to the original Petition (the lease) and repeated plaintiffs' demand for recovery of royalties due under the terms of the lease.

There is no allegation in either the original or Amended Petition (App. 1, 39) of a specific violation of the rules and regulations of the Secretary of the Interior or that what was done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is neither allegation of adverse

action by the Secretary nor of application to the Secretary (or his designee) and his arbitrary or fraudulent refusal to hear or decide or to grant relief.

We have set out for the convenience of the Court the nature of the pleadings, and now will set out the particular portions of the lease (and the Rules and Regulations of the Secretary of the Interior which are necessarily and inherently a part thereof) which are pertinent and necessary to be considered in connection with our points and which we believe to be absolutely controlling in support thereof.

(2) The Lease.—Lessee's obligation is stated (App. 5) in the following language:

> 3.(b) "(1) To drill *and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining land not the property of the lessor,* or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage." (Emphasis ours.)

The following royalty provision of the lease (App. 7) is very significant in at least two respects:

> 3. "(c) Rental and royalty.—To pay, beginning with the date of *approval of the lease by the Secretary of the Interior,* a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, *together with a royalty of 12½ percent of the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be 'royalty free'.*" (Emphasis ours.)

The following additional provision (App. 7) with respect to royalties and to whom and how they shall be paid is also significant and vital to one of the major questions presented here:

> 3.(c) "All rental and royalty payments except as provided in Sections 8(a) and 4(c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the Superintendent." (Section 8(a) applies only when supervision by the Secretary has been relinquished. Section 4(c) applies only when royalty is paid in kind.)

In connection with monies due to be paid to the government official, monthly statements are provided for (App. 7) in the lease:

> "(d) Monthly statements.—To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor."

It is provided in the lease (App. 7) that lessee agrees:

> "to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to the prevention of waste and preservation of the property and the health and safety of the workmen; * * *."

The Secretary's right of inspection (App. 7) is stated:

> 3. "d. The leased premises and all wells, producing operations, improvements, machinery and fixtures

thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior."

The Secretary's agents, the "Supervisor" and the "Superintendent" are designated (App. 5) as follows:

"2. The term 'oil and gas supervisor' as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term 'superintendent' as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased."

The authority of the Secretary and his agents over the drilling and production of wells (App. 5) is stated:

3.(b) "(1) * * * Provided, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior, * * * Provided, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated;".

The broad and exclusive authority conferred upon the Secretary of the Interior is established by the following covenant contained (App. 9) in the lease:

"10. Drilling and producing restrictions.—It is covenanted and agreed that the Secretary of the Interior

> may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, * * *."

A very significant provision of the lease, and in our judgment, a controlling one, is found in numerical paragraph 6. It reads (App. 7) as follows:

> "6. Cancellation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease *before restrictions are removed*, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, *and after a hearing*, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall *then* be entitled and authorized to take immediate possession of the land; *Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.*" (Emphasis ours.)

With respect to removal of restrictions and relinquishment of supervision, it is provided (App. 9) in the lease:

> "8. Relinquishment of supervision by the Secretary of the Interior.—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. *Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as provided in section 3(c).*" (Emphasis ours.)

In the lease it is stated (App. 7) that lessee agrees:

"(g) Regulations.—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases; Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

2. Rules and Regulations of the Secretary of the Interior.

These Regulations are found in "Chapter 1—Bureau of Indian Affairs—Title 25 Part 189 (effective till 1957) and Part 172 (effective in 1957 and thereafter)—Leasing of Allotted Lands for Mining" and "Code of Federal Regulations—Title 30—Mineral Resources Chapter II—Part 221—Oil and Gas Operating Regulations." The references hereinafter contained will be to the numerical sections of the Chapters and Parts above referred to.

As indicated by the title description just given, Title 25, Sections 189.1 and 172.1, *et seq.*, deal with "Leasing," the form and requisites of the lease and definitions of terms to be used therein and of officers upon whom duties and responsibilities are to be cast thereby, such as "superintendent" and "supervisor," two of the most important of said officers for present consideration.

Title 30, Sections 221.1, *et seq.*, as indicated, deal with Oil and Gas Operations, that is, the control under the overall plan which the Government, as *guardian* of the Indians, has arranged, promulgated and placed in operation. These regulations also specify and define the controlling agencies of the Government.

Sections 189.1 and 172.1 each reads:

"§ 189.1 (172.1) Definitions. (a) The term 'superintendent' in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the allotments involved.

"(b) The term 'supervisor' in this part refers to a representative of the Secretary of the Interior, under direction of the Director of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid."

With respect to the type and form of leases to cover restricted Indian land such as that here involved, Sections 189.32 and 172.32 each reads:

"§ 189.32 (172.32) Forms. The forms prescribed for use in connection with the regulations in this part are designated as follows, and may be obtained from the superintendent at a cost of 10 cents each:

* * * * * *

"5-154h. (Revised Apr. 24, 1935) Oil and gas lease."

Each of such leases *must* provide that all bonuses, rents, any royalties, including advance rentals and royalties shall be paid to the Department through the "Supervisor" and the "Superintendent," both designees of the Secretary of the Interior:

"§ 172.14 Payment of advance rentals and royalties. (a) Except as provided in paragraphs (b), (d) and (f) of this section, all rents, royalties and other pay-

ments due under leases which have been or may be approved in accordance with this part shall be paid by check or bank draft to the order of the Treasurer of the United States and transmitted through the supervisor to the Superintendent for deposit to the credit of the various lessors. When lessees and purchasers are instructed, in writing, by the Superintendent, which instructions shall be complete as to lessors for each lease, separate remittances for each payment due each lessor shall be made to the Superintendent." (Paragraphs (b), (d) and (f) are irrelevant here.)

The Secretary and his designees are referred to as follows:

"§ 221.2 Definitions. The following terms as used in the regulations in this part shall have the meanings here given:

"(a) Secretary. The Secretary of the Interior, except where lands in naval petroleum reserves are involved, and in that case the Secretary of the Navy.

* * * * * *

"(c) Supervisor. A representative of the Secretary, under administrative direction of the Director, authorized and empowered to supervise and direct oil and gas operations and to perform other duties prescribed in the regulations in this part, or any subordinate of such representative acting under his direction.

* * * * * * *

"(e) Superintendent. The Superintendent of an Indian agency, or other officer authorized to act in matters of record, law, and collections with respect to oil or gas leases for restricted Indian lands."

The function and controlling effect of these "Regulations" are made crystal clear:

"§ 221.1 Introduction. The regulations in this part will govern the development and production of deposits of oil, gas and casinghead or natural gasoline, including propane, butane, and other hydrocarbons, and fluids, and lands containing such deposits *owned or controlled by the United States, and under jurisdiction of the Secretary by law or administrative arrangement.* The regulations in this part shall be administered under the Director of the Geological Survey, except that as to lands within naval petroleum reserves they shall be administered under such official as the Secretary of the Navy shall designate." (Emphasis ours.)

The authority of the "Supervisor" for any district is stated:

"§ 221.3 Jurisdiction. Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, *determination of royalty liability,* receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of the regulations in this part for defaults or noncompliance with duties by the lessee and, in general, *all operations subject to the regulations in this part are under the jurisdiction of the supervisor* for any district as delineated by the Director. As to producing leases of Indian lands, the officer in charge, and as to land within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. * * *" (Emphasis ours.)

The general functions of the Supervisor are stated:

"§ 221.4 General Functions. The supervisor is hereby authorized to require compliance with lease terms, with the regulations in this part, and all other applicable

regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area, the regulations in this part are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the Supervisor, and to any area plan of development that may be adopted pursuant to law. * * *"

In Section 221.18 it is provided:

"The Lessee shall comply with the terms of the lease, and of the regulations in this part and any amendments thereof, and with the written instructions of the supervisor, * * *."

In Section 221.21 the obligation of the lessee is further stated:

"(c) The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the sum to be computed monthly by the supervisor."

Section 221.35 reads in part:

"The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil."

Again the Regulations are specific and exclusive as to who shall be entitled to receive any monies due from the lessee on account of operations under the lease, Section 221.40 reading in part:

> "(a) When due in money, the lessee shall tender all payments of rental and royalty by check or draft on a solvent bank, or by money order drawn to the order of the appropriate receiving officer, * * *."

Strict accounting is required of the lessee to be made to the Indian Department only. Section 221.62 reads:

> "When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on Form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. * * *"

And 221.63 reads:

> "Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands."

And Section 221.60 provides:

> "A separate report of operations for each lease must be made on Form 9-329 for public land and on Form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor."

And then providing for an administrative remedy for the lessors as well as for any other aggrieved and interested party, are Sections 172.23 and 221.66 of Titles 25 and 30 respectively.

The part of Title 25, Section 172.23 which is here pertinent reads:

> "(a) A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, *or if at any time the Secretary is satisfied that the provision of the lease or of any regulations heretofore or hereafter prescribed have been violated.*" (Emphasis ours.)

And then Title 30, Section 221.66 provides for administrative remedy and review of all orders made and entered under authority of the regulations:

> "§ 221.66 Appeals. * * *
>
> "(a) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of facts must be made under oath.
>
> "(b) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises and that officer shall review the record and render such a decision in the case as he deems proper.
>
> "(c) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's decision. * * *"

IV. SUMMARY OF ARGUMENT

1. Plaintiffs having chosen their forum are bound by its requirements, their agreements in open court and orders pursuant thereto, including venue requirements and the nature of their action in that venue.

2. Preliminary legal premises are important, i.e., the procedural code of Oklahoma, the requirements thereof and established practices thereunder including (1) the demurrer and its functions, (2) the judicial notice to be taken, (3) the effect of exhibits pleaded, (4) the established rule that a judgment which is right for any reason must be affirmed, and (5) the controlling effect of venue statutes affecting the forum chosen.

3. A pending action in a chosen forum will not be construed to be of such a character as to make it justiciable only in a forum of different venue where it is susceptible of construction as being of another character which would make it initially justiciable in the chosen forum, and especially is this true where agreement of the parties in open court has been acted upon by that court to establish its initial justiciable character in the forum where pending.

4. Petitioners, plaintiffs below, had no "standing" as distinguished from "capacity," to maintain the instant suit since the instant suit is clearly and only an action in Oklahoma County upon the contract to recover royalties alleged to be due on account of gas used in the production of oil under supervision and regulation of the Secretary of the Interior and could not be construed to be an action to establish, maintain and protect the rights of the plaintiffs in and to their real property located in Stephens County,

Oklahoma, in which latter county sole venue for such latter action would lie.

5. Vested rights acquired by the defendant-lessee under a Departmental Lease and the rules and regulations of the Secretary of the Interior which were a part thereof could not be impaired by retroactively vesting in plaintiffs a power or authority which they did not have, and which if exercised contrary to previous actions or acquiescence by the Secretary of the Interior, or his agents, would impair the obligation of defendant's contract and take its property without due process of law. Neither the Secretary of the Interior nor Congress has been or could be vested with power or authority to give "consent" or otherwise to accomplish this result.

6. The scope and extent of governmental authority over operations by lessee is well established, the lessee having been at all times bound thereby and operations by the lessee of and upon the lease consistent with supervision by and direction of the Secretary of the Interior, furnished lessee under the Constitution of the United States with complete protection against adverse claims of Indian wards growing out of such compliance.

7. The contentions of the Petitioners, and the supporting position of the Solicitor General in his Amicus Curiae Brief upon behalf of the United States would, if sustained, sound the death knell to effective regulation by the United States of the affairs of its restricted Indian wards, contrary to long established precedent and solely as a matter of judicial fiat contrary to the intent and purpose of the Congress of the United States.

8. The authorities cited by the Petitioners in their Brief and those cited by the Solicitor General in his Brief are inapposite. They deal with situations entirely different in that they deal with justiciable controversies of a character or characters forbidden to be entertained by the District Court of Oklahoma County, Oklahoma, the forum chosen by the plaintiffs.

9. The past actions and decisions of the Secretary of the Interior and his authorized agents in the course of supervision over the operations of the Aitson Lease, previously acted upon by the lessee, are presumed to have been right and proper and in that regard are not subject to judicial review or reversal nor are they subject to be ignored and given no effect. Certainly this is true in the absence of any allegation or claim of arbitrary, illegal, fraudulent, corrupt or unreasonable action by the Secretary in this regard.

10. Plaintiffs have not exhausted their administrative remedy specifically provided in and by the lease and by the rules and regulations promulgated by the Secretary of the Interior, and until they have done so they cannot have access to any court.

11. Correction here of basic, fundamental and constitutional error committed by the Supreme Court of Oklahoma adverse to the Respondent and destructive of its constitutional rights will leave nothing for this Court to review, and the judgment below must be either affirmed or the Writ of Certiorari heretofore issued by this Court should be recalled, set aside and vacated, or if there be remand, it should be with directions to the Supreme Court of Oklahoma to dismiss plaintiffs' appeal to that court.

V. ARGUMENT AND AUTHORITIES

1. Preliminary Legal Premises

(1) Demurrer.

Petitioners are bound by their choice of the forum. Under the code of civil procedure of Oklahoma a "demurrer" raises every legal question arising out of and apparent from the face of the pleading (or of absence of essential fact) which is dispositive of the case as far as the instant pleading is concerned. And if it appears as a matter of law that there can be no recovery upon the basis of such pleading or upon proper judicial notice, factually or legally, the demurrer must be sustained. A demurrer does not admit the truth of conclusions of law or statements of fact themselves disproved or rendered immaterial upon the face of the pleading or controlling exhibits. *Southern Surety Co.* v. *Municipal Excavator Co.*, 61 Okla. 215, 160 Pac. 617, 619 (1916); *Williams* v. *Phillips Petroleum Co.* (Okla. 1965), 406 P.2d 474, 477; *Savage* v. *Woods* (Okla. 1954), 268 P.2d 858, 860; *State ex rel Nesbitt, Attorney General* v. *Liberty National Bank and Trust Co.* (Okla. 1966), 414 P.2d 281, 284-285); *Diehl* v. *Phillips Petroleum Co.* (Okla. 1962), 376 P.2d 203, 206; *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 989-990 (1943).

(2) Effect of Exhibit.

It is fundamental and elementary that the express terms and provisions of an exhibit attached to a petition and which constitutes the basis for the asserted right to recover, controls the allegations of the petition. If authority need be cited on this point, see *Droppelman* v. *Horsley* (C.A. 10, 1967), 372 F.2d 249.

(3) Judicial Notice.

As to judicial notice on demurrer to petition, see: *Corliss* v. *Davidson & Case Lbr. Co.*, 183 Okla. 618, 84 P.2d 7, 10 (1938); *Wilson-Harris* v. *Southwest Tel. Co.*, 193 Okla. 194, 141 P.2d 986, 990 (1943); *Chisholm* v. *Stephenson* (Okla. 1961), 363 P.2d 229.

(4) Effect of Judgment.

It is well established that if a judgment appealed from is right for any reason or upon any legal basis, it must be permitted to stand. *Witmer* v. *United States* (3rd Cir., 1938), 96 F.2d 745, 746; *Hall* v. *Deal*, 205 Okla. 46, 234 P.2d 384, 389 (1951); *Wilson* v. *Berryhill*, 181 Okla. 213, 73 P.2d 449, 453 (1937).

The judgment of the trial court in the case at bar was affirmed (App. 61-69, 73) by the Supreme Court of Oklahoma in its entirety. It was affirmed, not only for the reason that (1) plaintiffs had no right to prosecute or maintain the action because of their contract and the federal law applicable thereto, but also because (2) the pleadings disclosed that plaintiffs could not recover on the merits (a) because they were not the real parties in legal interest, and (b) defendant had done nothing in violation of the contract, and (c) there had not accrued any unpaid liability or obligation for the payment of "royalty" under the lease or otherwise.

(5) Venue.

This is a point which petitioners ignore and Amicus Curiae avoids. The Oklahoma code provides for limitations upon venue. While an action upon a simple contract, neither involving an interest in real property nor damage to land, is transitory and may be brought wherever the defendant may be properly served with process, an action *in contract or otherwise* for recovery of damages to land or involving tortious or illegal use or taking thereof or therefrom must be brought in the county where the land lies. 12 O.S.A. 131 reads in part:

> "Actions for the following causes must be brought in the county in which the subject of the action is situated, * * *:
>
> "1st, For the recovery of real property, or of any estate, or interest therein, or the determination in any form of any such right or interest.
>
> * * * * * *
>
> "5th, For all damages to land, crops, or improvements thereon, action must be brought in the county where the damage occurs."

—*Atchison, Topeka & Santa Fe R. Co.* v. *Superior Court of Creek County, Oklahoma* (Okla. 1962), 368 P.2d 475;

Fox v. *Superior Court of Creek County, Oklahoma* (Okla. 1962), 368 P.2d 484;

Ross v. *District Court of Oklahoma County, Oklahoma,* 199 Okla. 573, 188 P.2d 861 (1948);

Sinclair Prairie Oil Co. v. *District Court of Pottawatomie County, Oklahoma,* 180 Okla. 455, 70 P.2d 94 (1937).

Any contrary decisions by the Supreme Court of Oklahoma were prior to the 1957 amendment to 12 O.S.A. 131 which added paragraph 5th.

This explains the significance of the express limitation (App. 17, 18-19) of this suit by counsel for the plaintiffs to one *on the contract*. Faced with a preliminary motion requiring election, plaintiffs' counsel elected formally and conclusively to proceed *ex contractu* upon the lease because they knew that an action for damages or "waste" would have to be instituted, if at all, in Stephens County, Oklahoma, where the leased land was located and that in such case their pending suit in Oklahoma County would have to be dismissed for want of venue. The only action which could be brought upon the lease to recover "royalty," was for a percentage of "oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased," specifically excepting oil and/or gas used by the lessee for development and operational purposes on the lease, "which oil or gas shall be 'royalty free.'"

2. The Merits

At the outset of this Brief, we stated the three major points relied upon to support the demurrer. We proceed first to a discussion of each. But initially, we wish to make clear that which plaintiffs have tended to confuse and improperly limit by incorrect statements in their Brief. We do not contend, as suggested by plaintiffs, that simply because plaintiffs are Indians they have no capacity to sue in an action properly maintainable by them. It is not want of "capacity" to sue as "citizens" but rather legal inability to maintain *this* suit for *several* reasons, sounding in both law and contract.

We make no claim, and neither the trial court nor the Supreme Court of Oklahoma held, that the Indians here were "incapacitated" to sue in a state court in a *proper* case upon a *proper* cause of action assertable by them. Not only did the Supreme Court of Oklahoma make it perfectly plain (App. 61-69) that it was not holding that the Indians would not have a right to sue in proper case but made it also perfectly plain that the case as presented and determined upon the demurrer was decided upon the merits.

We are not in disagreement with the decisions in the cases cited and quoted from by plaintiffs and Amicus Curiae in their briefs. But it needs to be noted that those cases all deal with factual situations and claims entirely different in character from those in the case at bar. Except as to venue, we make no distinction between state and federal courts as to jurisdiction. The rules we contend for apply to whatever court of record in which the suit may have been properly filed. We do not claim that plaintiffs have no standing to appear as litigants in a proper case in either state or federal court. We simply say, as held by Judge Kennamer in *Seber* v. *Spring Oil Co.* (D.C., Okla. 1940), 33 F.Supp. 805, that they are not the ones authorized by law and the contract which is the basis of the action to seek the relief. The law and the contract forbid it. The question is thus one of "standing" to recover rather than one of "capacity" to sue, as this distinction is recognized in many decisions by this Court. This recognizes no distinction between a restricted Indian, as plaintiff, and an unrestricted non-Indian or white man *under the same conditions.* If an unrestricted white man (and especially if at the time of suit he is under guardianship) had made a lease agreement containing all

the covenants and provisions which the Departmental Lease in suit here contains (vesting complete control in another), the rule which we contend for would be equally applicable to him.

Conditions precedent to the bringing of this action have not been made or performed or alleged. Underlying requisite determination by the Secretary of the Interior (exclusively his function), which are conditions precedent to the maturing of a cause of action, have either been made contrary to the existence of a cause of action or have not yet been made at all and are not alleged. Recovery cannot be had by plaintiffs because the right of determination is not vested in them but on the contrary is exclusively vested by law and the contract in another. Rule No. 17, Federal Rules of Civil Procedure. A permitted course by the Secretary under the contract and the law precludes any triable controversy. No case or authority cited by plaintiffs touches this situation or holds in anywise to the contrary, even by the slightest inference.

The Court will not find in any case relied on by plaintiffs or Amicus Curiae any holding that plaintiffs may ignore the law and the contract and seek a recovery which that law and that contract deny them the right to have. How absurd it is to argue that one person can sue for a judgment which must be rendered in favor of another and executed, if at all, in favor of another, a stranger to the suit and not even constructively present therein. Such would be "the wards" suing in behalf of "the guardian" (App. 42).

The Court will find, as we assert, that every case cited by plaintiffs involved title to, right to possession of, trespass

upon, determination of interest in, ejectment from or value of tortious use of lands or tangible personal property or purely unrestricted personal rights of the Indians. In each of such cases the judgment was or would be completely self-executing in favor of the Indians directly and in no case would require execution in favor of a stranger to the suit. And in no such case was there a "Departmental Lease" or departmental regulations providing that only the Secretary of the Interior could have control over the performance of the contract from which the alleged rights spring and would be the only one to receive the considerations payable (whatever they might be), or to determine what was due under the contract, or whether the contract was fully performed or breached in any respect. But such is the agreement and the law here.

3. The Government's Position

It is strange to us that the Solicitor General now comes into this case, nominally upon behalf of the United States, erroneously advocating that the Petitioners be now permitted to assert that which the Government has so long and consistently refused to support, though in this very case formally and informally long since invited to do so (App. 20-23).

The Solicitor General's suggestion is that the reason is to be found in "interest" in preventing racial discrimination (Am. Br. 2). Does the Government and the Department of the Interior plead guilty to long-continued acquiescence in such "discrimination"? Obviously not, because there is not such here nor in the Congressional intent nor in the Departmental purpose nor in the many cases adjudicated

by honest, fair-minded judges. The very suggestion is abhorrent to the cause of law in a case where the assumed fact is not present nor an issue, now or ever. The truth is the Government did not support the position of the Petitioners because there is no merit in their case.

The Supreme Court of Oklahoma merely decided the case brought before it as made by Petitioners below pursuant to their voluntary election (App. 17-19), *i.e*, a case for recovery of royalties alleged to be due by the terms of the lease contract. Nor does the Solicitor General strengthen Petitioners' case by the inferential suggestion (Am. Br. 5) that the Government's long acquiescence in the rectitude of Respondent's position is the result of lack of "judgment" and "zeal" of other Government attorneys. It would seem to be true that all the virtue of these qualities could not be said to rest in a few.

While recognizing (Am. Br. 5, 4) that the hazard of subjection to double-suit exposure is expressly found undesirable, unfair and unjust by Congress in its legislation applicable to the Five Civilized Tribes (44 Stat. 239, 240) but while admitting such legislation is not applicable to these Petitioners or their suit, the Solicitor General brushes this off, by making light of the problem by the unsupported statement that this "reflects the legislative approach" (not appropriate because not intended here) to make applicable to these Petitioners something admittedly not applicable, and by reference to other non-analogous anti-trust, civil rights and military service remedies which are of entirely different character and for different purposes. Then follows pure unsound rationalizing that the *degree* of risk is small (Am. Br. 5). This isn't so merely because

the Solicitor General says it is so, and the answer is to be found in the contract itself, the rules and regulations relating to it and a part of it and the many adjudicated cases to the contrary as hereinafter shown. The Solicitor General then proceeds to treat this case as if it were something *entirely different* from that which it really is. Such is recognized by indirection in the footnote 7 at page 6 of the Amicus Curiae Brief, but evasion is sought by suggesting that this is really immaterial since not here yet an issue. Nothing could be further from the truth.

If the character of the suit with which the Supreme Court of Oklahoma dealt was, under proper practice in the forum deliberately chosen by plaintiffs, clearly and expressly marked out and delineated by specific choice by the plaintiffs themselves (App. 17-19), such Supreme Court was limited thereby and by the legal rules, requirements and precedents controlling same. Neither the court nor the litigants were then at liberty to change that character or to treat the case as something it clearly was not nor was the court permitted to decide a case *not before it*. So the character of the action, questions of venue (the answer to which excludes any other character of action than that so presented) and legally and properly established procedural requirements were each then, as now, of prime importance.

Thus, neither the General Allotment Act (24 Stat. 388, as amended) nor the cases cited by the Solicitor General (Am. Br. 3, 5, 6) support Petitioners. Specific references for distinction purposes will be made to such hereinafter under the subsequent subheading "Cited Authorities Distinguished."

4. Propositions

Proposition One

The plaintiffs cannot institute, maintain or prosecute this action and cannot procure a judgment in this cause in their favor.

As to this point, the law seems to be clear. The terms of the lease, the statutes of Oklahoma, the statutes of the United States, the Rules and Regulations of the Secretary of the Interior (which must be read into the lease) and the decisions of the state courts and of the federal courts preclude the institution and maintenance of this action for recovery by the plaintiffs. This will be demonstrated.

Upon consideration of paragraph 6 of the controlling lease (App. 7) together with the other provisions of the lease, as above quoted, and the broad specific authority reserved to the Secretary and his designees by the Rules and Regulations, also as above quoted, it becomes conclusively apparent that the Indians *agreed* that they would neither have, nor exercise nor seek to exercise any right to institute, maintain or prosecute any action "at law or in equity" either upon the lease or for breach thereof. The Secretary, *as a federal restriction* upon the lease, the land it covered and the emoluments thereof, unconditionally reserved the right to determine all the incidents of the lease, including what amounts would be due to be paid thereon, their origin, their nature and the time of payment. This necessarily included the right to determine the negatives also, *i.e.*, what is not payable and what were proper operations, what use of gas by lessee was royalty free, and all the circumstances which entered into all these things. This is accentuated by reference to Title 25, Section 172.23 above

quoted which says that the "Secretary" will cancel the lease *if at any time* he is satisfied that the provisions of the lease or the regulations have been violated. Since he has not "cancelled" the lease here involved it must be concluded that he has ascertained that neither the lease nor the regulations have been violated. It was exactly *because* of these rights of affirmative *and negative* determination that it was expressly decreed (App. 7) by the Secretary in his required form of lease (Par. 6) that *only* where "restrictions are removed" can lessors (the Indians):

> "be entitled to any available remedy in law or equity for breach of this contract by the lessee."

The relationship of the Federal Government and the plaintiffs is that of "guardian and ward" and the unimpeachable, indestructible position of the Federal Government is well and authoritatively stated by the United States Court of Appeals for the Tenth Circuit in *Town of Okemah, Oklahoma* v. *United States* (Mar. 13, 1944), 140 F.2d 963, 964, as follows:

> "During the continuation of such guardianship, it is the right and the duty of the United States to enforce the restrictions designed for the security of the Indians by all appropriate means. 'The national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.' It has a governmental interest in the enforcement of the restrictions. It is not essential that it should have a pecuniary interest."

The difference between being an Indian "citizen" with access to the courts and one with no such access with re-

spect to a particular matter because of superior control by the United States is made clear by the Court in *In re Long's Estate*, 207 Okla. 259, 249 P.2d 103, 105-106 (1952), where it is said:

> "(1) We consider these decisions inapplicable to the case here presented. In Williams v. Steinmetz, 16 Okl. 104, 82 P. 986, we quoted with approval a statement in U. S. v. Flournoy Livestock & Real Estate Co., C.C., 69 F. 886, in which the court stated that the argument that congress could not make the Indians citizens of the United States without giving them unrestricted power to sell their property, was untenable, and that restrictions upon the sale or use of property were not affected by the fact that the owners were citizens of the United States.
>
> "And in Bowling v. U. S., 233 U.S. 528, 34 S.Ct. 659, 58 L.Ed. 1080, the Supreme Court said that the guardianship of the Federal Government over an Indian did not cease when an allotment was made and the allottee became a citizen of the United States. To the same effect is U. S. v. Noble, 237 U.S. 74, 35 S.Ct. 532, 59 L.Ed. 844."

The Court expressly held that the superior rights of the federal agency cannot be ignored or passed upon in a case when neither that agency nor the Government is a party (as here). The Court said:

> "Furthermore, the Secretary of the Interior by assuming the administration of such trust property has asserted the right to do so, and his claim of right may not be challenged in an action to which neither he nor the United States is a party. Hanson v. Hoffman, 10 Cir., 113 F.2d 780; Morrison v. Work, 266 U.S. 481, 45 S.Ct. 149, 69 L.Ed. 394."

And as pointed out in *Hallowell* v. *United States,* 221 U.S. 317, 324, 55 L.Ed. 750, 752, "citizenship" and "restriction" are two different things, the former in no wise altering, lessening or defeating the exclusive powers of the Government over the conduct of the Indian's business affecting his property.

Thus, by law and by agreement of lessors, lessee and the Secretary, actions may be instituted by the lessors involving the lease *only* upon the expressly stated conditions, which did not and do not exist here. "Restrictions" had not been removed at the times involved here, and have not now been removed, and there is no allegation in the Petition of such. To conclude otherwise than as here argued would nullify and destroy the intent and effect of the quoted language from paragraph 6 aforesaid and be an attempt to remove or interfere with federal restrictions lawfully imposed, and would destroy and interfere with the whole federal plan for the guardianship of these wards of the Government.

The established doctrine expressed in the phrase "*expressio unius est exclusio alterius*" is clearly applicable here. The statement in the lease of the particular conditions under which an action involving rights under the lease might be instituted and prosecuted by the Indians excludes the bringing or maintenance of the action by the *Indians under any other circumstances.* See: *Midland Cooperative Wholesale* v. *Ickes* (8th Cir., 1942), 125 F.2d 618; *Cornell* v. *McAllester,* 121 Okla. 285, 249 Pac. 959, 961 (1926); *Natural Gas Development Corp.* v. *Oklahoma Tax Commission,* 188 Okla. 557, 111 P.2d 483, 484 (1941). Only the

Secretary could terminate or cancel the lease by recovery of damages for its *breach,* or otherwise.

The strength of the arguments advanced above will also appear from a consideration of the authorities hereinafter cited and from the cited statutes and decisions of the courts.

The plaintiffs are not the "real parties in interest" and any judgment rendered in their favor would not bind the Government but would be an attempt to interfere with the Federal Government's guardianship, restrictions and *modus operandi* established by law. *All* the bonuses, rentals, profits, royalties and money damages are payable (not to the Indian lessors) to the Secretary. The Secretary has the exclusive right to them. The Secretary will determine what royalties he wishes to demand and what would be just and fair *not to demand. He could not be forced by this Court to take that which he does not believe is due.* And yet, *indirectly,* that would be the result of permitting these plaintiffs to recover (and they could only recover *in their own* right). And a judgment in favor of these Indians would, if valid, effectively remove "federal restrictions" to-wit: The restriction against the Indians having the right to have paid *to them* restricted funds which the Government and the lease and the law say *they may not have.* The law on this will be presented herein later.

A defendant has the right to have a cause of action prosecuted against him by all of the real parties in interest, and all parties united in interest as parties plaintiff in the subject matter of the litigation must be joined as plaintiff.

—*Haught* v. *Continental Oil Co.,* 192 Okla. 345, 136 P.2d 691 (1943);

Rule No. 17, Federal Rules of Civil Procedure.

(a) No effective "consent" was or could have been given by the "Secretary" for the plaintiffs to maintain this suit.

It may be subsequently urged that the Secretary has "consented" that these plaintiffs may sue. Such contention is here anticipated only. In truth, there was no effective consent by the Secretary or otherwise. Whatever might have been the "power" of the Secretary to furnish "consent to sue," neither he nor the Government itself could have invested plaintiffs with "standing" to maintain the action as against the already vested rights of the lessee—vested rights recognized by the Secretary and necessarily conceded to be morally and legally valid by the Secretary's refusal to file or join in the case (App. 20-23).

The "consent" (which may be but is not now urged by Petitioners) refers to a letter dated April 6, 1962, signed by "Will J. Pitner, Area Director," purporting to approve an attorney's contract between Houston Bus Hill and the Petitioners herein (App. 34-35). It is to be noted that while this suit was instituted in the District Court of Oklahoma County, Oklahoma, on the 9th day of August, 1961, the letter referred to is dated nearly a year later and it does no more than to "approve" the attorney's contract upon conditional terms. The language of this so-called "approval" shows that it does not even purport to be an attempted consent by the Secretary of the Interior that the action may be maintained by the Indians in lieu of the United States or in lieu of the Secretary.

The restrictions upon these Petitioners have never been removed. There is no indication of any kind of an intent, purpose or attempt to waive, modify, repeal, set aside,

diminish, relinquish or release any of the restrictions imposed by the departmental lease and the regulations to permit the Indians to assert those rights vested exclusively in the Secretary of the Interior, or to have paid to the Indians any of the benefits of the lease or income or emoluments flowing therefrom or thereunder. If there had been any such intent, it would have been a simple matter to have brought about a "removal" of restrictions by the Secretary of the Interior. But neither was done.

Even if it had been the intent of the "Area Director" to authorize the plaintiffs to bring this suit, such would be wholly ineffective for at least three reasons: (1) The only legal way to have done so would have been under paragraph 6 (App. 7) of the lease by removal of restrictions, and (2) the letter of Will Pitner is without legal effect to change established law, the federal statutes and the rules and regulations of the Secretary of the Interior, or any of them, and (3) no officer or agent of the Federal Government can by *ex post facto* act, destroy, ignore or obliterate the accrued property rights of a party with whom it has dealt in good faith. See: *Minnesota* v. *United States,* 305 U.S. 382 (1939).

(b) Governmental regulation is time-honored and court-approved.

The following discussion and citation of and quotation from federal court decisions indicate the character of the right of the Government with respect to these claimed rights of the Indians, with respect to the character of the funds sought to be recovered, the nature of the restrictions thereon, the exclusive right of the Secretary to enforce or

decline collection, the reasons therefor and the nature of the requirements that *all* funds be recoverable by and paid to the Secretary.

The first case discussed here is squarely in point *in every essential respect.* The opinion was written by a learned and experienced judge who had adjudicated and decided Indian affairs for many years.

Seber v. *Spring Oil Co.* (D.C., Okla. 1940), 33 F.Supp. 805, is direct authority for the proposition that these plaintiffs cannot maintain this action.

Plaintiff was a member of the Creek Tribe. A Departmental Lease for oil and gas had been executed and delivered to the Spring Oil Company covering restricted lands of the Indian. The Indian sued for casinghead gas royalties claiming they were not payable under the lease to the Superintendent because not expressly covered or provided for by the lease. Recovery was denied on the ground that the royalties *were* covered by the lease by reason of regulations of the Secretary of the Interior applicable to the lease. Plaintiff's action was dismissed on the ground that she couldn't recover the royalties since they were payable to the Superintendent.

In the opinion the Court said (809):

> "The rules and regulations of the Secretary of the Interior concerning oil and gas leases of restricted lands of members of the Five Civilized Tribes became part of the lease by express agreement of the parties and such regulations will control."

And also (810):

"In the instant case, the regulations, which were incorporated in the lease by reference, fully provided for the casinghead gas, making express provision that the Lessee shall be entitled to it and that a royalty shall be payable thereon, and fix the method of determining the amount thereof."

And finally:

"The allegation that no royalties for casinghead gas have been paid to plaintiff is immaterial, for the royalties are payable to the Superintendent of the Five Civilized Tribes, under the terms of the lease."

The Court dismissed the action by the Indian.

The *Seber* case has been followed and cited with approval on other points by many courts, among them the Supreme Court of Oklahoma in *Diehl* v. *Phillips Petroleum Co.* (Okla. 1962), 376 P.2d 203, where it is said:

"The regulation has the force of law and we are privileged to take judicial notice of same."

The decision in *Hansen* v. *Hoffman* (10th Cir., 1940), 113 F.2d 780, also contains an excellent discussion upon this subject. Headnote 14 reads:

"So long as legal title to restricted funds of Indian derived from restricted allotments of Indian remained in hands of Secretary of Interior subject to his administration and control and within his quasi-judicial power, that power could not be controlled or restrained by judicial action."

In *United States* v. *Hinkle* (8th Cir., 1919), 261 Fed. 518, it is held:

> "* * * the exclusive custody and control of mineral rents and profits derived from restricted lands * *.* is vested in the Secretary of the Interior, subject only to such rules and regulations as he may prescribe."

In *United States* v. *Fitzgerald* (C.A. 8, 1912), 201 Fed. 295, the Court, speaking through Judge Sanborn, held that the taking of a restricted Indian's property

> "was an infringement of the governmental rights of the United States, and hindrance of its governmental policy and a wrongful seizure of the lawful means it was using to carry that policy into effect"

and, therefore, an invasion of the Government's rights for which the Government must sue.

In *House* v. *United States* (10th Cir., 1944), 144 F.2d 555, it is expressly held that:

> 1. Royalties accruing to restricted lands are and remain trust funds even though paid out monthly by the Superintendent to the Indian, and
>
> 2. Such funds do not even pass to the Executor or Administrator of the dead Indian to whose credit they stand on the books of the Government.

In *Butler* v. *Denton* (D.C., Okla. 1945), 57 F.Supp. 656, *aff'd* 150 F.2d 687, the Court held that a suit against the executor of a deceased restricted Indian to establish the interest of the plaintiff Indian in and to restricted funds of the dead Indian, such funds being then in the hands of the Superintendent, could not be maintained. Not even the executor is entitled to sue for or have judgment for or possession of such funds. See also: *Ward* v. *United States* (10th Cir., 1943), 139 F.2d 79; *United States* v. *Williams*

(10th Cir., 1943), 139 F.2d 83, *cert. den.* 322 U.S. 727; *LaMotte* v. *United States*, 254 U.S. 570, 65 L.Ed. 410 (Okla. 1921).

If the relief sought would, if granted, conflict or interfere with United States restrictions, management, supervision or operations of Indian lands or their profits or rentals or royalties therefrom, then no relief can be granted. *Bunch* v. *Cole*, 263 U.S. 250, 68 L.Ed. 290 (1923); *Sperry Oil Co.* v. *Chisholm*, 263 U.S. 488, 68 L.Ed. 803 (1924); *Bowling* v. *United States*, 233 U.S. 528, 58 L.Ed. 1080 (1914); *Barbre* v. *Hood* (8th Cir., 1916), 228 Fed. 658; *United States* v. *Moore* (8th Cir., 1922), 284 Fed. 86, 90; *Utilities Production Corp.* v. *Carter Oil Co.* (D.C., Okla. 1933), 2 F.Supp. 81, *aff'd* 72 F.2d 655; *Phenninghausen* v. *Horineck*, 112 Okla. 94, 240 Pac. 81 (1925).

The above cases demonstrate beyond cavil that the requirements that *all* funds shall be paid to the Secretary is mandatory, for a purpose and constitutes a federal "restriction" imposed by federal law. The ones now cited emphasize the point.

Rents and royalties from restricted lands are also restricted unless relieved therefrom by affirmative act of the supervising government. *United States* v. *Noble*, 237 U.S. 74, 59 L.Ed. 844 (Okla. 1915); *Motte* v. *United States*, 283 U.S. 747, 75 L.Ed. 1385 (Okla. 1931); *Parker* v. *Richard*, 248 U.S. 235, 63 L.Ed. 954 (Okla. 1919); *Ickes* v. *Perry* (C.A., D.C., 1933), 64 F.2d 982; *King* v. *Ickes* (C.A., D.C., 1933), 64 F.2d 979.

In *United States* v. *Hellard*, 322 U.S. 363, 88 L.Ed. 1326 (Okla. 1944) (an important case), it is squarely held that

even though the state courts are given jurisdiction to partition restricted Indian lands, the lands are still "restricted" and the United States is an essential party to the proceeding without the presence of which no valid judgment can be entered.

A requirement by regulation that mineral rentals, royalties and profits from a lease on restricted Indian lands be paid to the Secretary of the Interior is a federal "restriction" which the state courts must honor and abide by. *Motte* v. *United States,* 283 U.S. 747, 75 L.Ed. 1385 (Okla. 1931); *Bunch* v. *Cole,* 263 U.S. 250, 68 L.Ed. 290 (1923); *Hansen* v. *Hoffman* (10th Cir., 1940), 113 F.2d 780; *Bowling* v. *United States,* 233 U.S. 528, 58 L.Ed. 1080 (1914); *Chisholm* v. *House* (10th Cir., 1947), 160 F.2d 632; *United States* v. *Brown* (8th Cir., 1925), 8 F.2d 564, *cert. den.* 270 U.S. 644.

It must follow that a suit which cannot proceed to judgment, because of facts clearly appearing from plaintiffs' Petition and because of established law which the court does not have judicial power or authority to change, alter, revise, ignore or add to, must be dismissed upon demurrer.

(c) Compulsory compliance by Lessee with operational requirements of "Secretary" clothed Lessee with protection against adverse claims of Indian wards growing out of such compliance.

As inherent in the action of the trial court and as expressly stated (App. 63) by the Supreme Court of Oklahoma, there is here no charge that the lessee, Skelly Oil Company, failed, neglected or refused to operate the lease in conformity with directions of the federal supervisors and, stated in accord with the belief of "the responsible officials

of the Department of the Interior," it actually did comply with such directions, *the United States having determined not to sue and having refused an invitation to come in and take this case over.*

Conceded that this lessee contracted in good faith with the Indian-lessors and the Secretary of the Interior, and thus with the United States, that it would comply exclusively with the directions of the supervisory officials of the Department in the operations of the lease, in return for which it was given assurance that if it did so, it would be free of interference and litigation by the Indian-lessors as long as the Secretary had not removed restrictions upon the Indians, what kind of law would it be which would say that notwithstanding, the Indian-lessors, being still restricted, may "disagree" with the decisions and directions of said supervisors after *compliance therewith* and seek to recover damages or whatnot from the lessee for doing that which the supervisors had approved and/or directed? Would such not be an impairment of the obligation of contract? Would such be either moral or just?

Would it not be a form of judicial or legal oppression to adhere to and enforce a pronouncement that even though it is clear from the pleadings that these Petitioners cannot succeed, they must be afforded an opportunity by a trial to secure a favorable judgment which would run afoul of the law, or at least needlessly and futilely punish an innocent adversary by requiring a defense at great cost and expense?

In connection with the above, please see *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 338 (9th Cir., 1956), *cert. den.* 352 U.S. 988, and *United States* v. *Barns-*

dall Oil Company (10th Cir., 1942), 127 F.2d 1019. More than this, the Court should not do a futile and useless thing by reversing the judgment herein since under the above authorities it could only terminate in the same end-result. *Moviecolor Limited* v. *Eastman Kodak Company* (2nd Cir., 1961), 288 F.2d 80, 88, *cert. den.* 368 U.S. 821.

(d) Permitting maintenance of this suit to possible recovery against the Lessee would set a precedent resulting in destruction of governmental regulation.

It may be suggested that after the fact the Secretary may consent to the Indian's bringing suit if the Indian "disagrees" with the Department's previous decisions. But such is not tenable. Neither is it practical nor legal.

Under an announced and effective policy such as this, what lessee would be willing to enter into a departmental lease? Such lease would require it to abide by the regulations, follow directions of the supervisor and/or operate with his approval, knowing that if the restricted Indian "disagreed," for any reason, after accomplishment, the lessee could be and probably would be sued by the Indian-lessor. This would be so even though what had been done was not the result of the lessee's own choice or judgment. In each case, in each instance, and in any event the lessee would be required to protect itself by insistence upon formal concurrence by the lessor in every decision made by the supervisor. How could a lessee operate otherwise to protect itself against the clear and ever constant hazard?

If there is to be an end to traditional effective regulation and supervision by the Government heretofore Congressionally established for the necessary protection of

Indian wards, it ought not to be brought about by the judiciary or the executive. *United States* v. *9,345.53 Acres of Land* (D.C., N.Y., 1966), 256 F.Supp. 603. And neither the judiciary nor the executive should impair the obligation of its Government's contract with the Respondent. Nor should a state court be directed or permitted to do so. U. S. Constitution, Art. 1, Sec. 10. If such is not to be, then a reversal herein would be a futile act indeed—a mere empty academic gesture. This is assuredly true because in a trial upon the merits the existing contract would require judicial bar to recovery by the plaintiffs in this action.

5. Cited Authorities Distinguished

Since practically all of the cases cited by Petitioners and Amicus Curiae in their briefs have to do with the subject matter of the argument here presented under our Proposition One, this is the most appropriate place in this Brief to call attention of the Court to the great distinction which exists between the class and type of cases cited and relied upon by Petitioners, on the one hand, and the case at bar, on the other hand.

Upon a mere reading of the cases cited by Petitioners they furnish their own distinction, as to both law and facts, from the case at bar. But brief reference to the principal distinguishing points in the cases upon which reliance is placed by plaintiffs may be helpful and justified.

It may be well first to point out that a general distinction exists between cases involving members and lands of the Five Civilized Tribes and those involving other Indians and also between cases involving "Departmental Leases"

and those not so doing (Am. Br. 4, Footnote 3). In the first class of cases there is a specific statute applicable to members and lands of the Five Civilized Tribes (Act of April 12, 1926, 44 Stat. 239) which has no application to other Indians, other Indian Tribes and other Indian lands. In the second class of cases "Departmental Leases" (and regulations pertaining thereto which are a part thereof) leave full control of *everything* in the Secretary of the Interior, while such is not true where the lease is upon another form.

Sadler v. *Public National Bank and Trust Company of New York* (10th Cir., 1949), 172 F.2d 870 (Pet. Br. 8, 10), was a case in which members of the Five Civilized Tribes brought an action under the Federal Statute relating to the Five Civilized Tribes (44 Stat. 239, upon which the case really turned), to cancel an oil and gas lease, to recover possession of the land, to quiet title and to partition same. United States was notified under the statute and appeared in the cause. Nothing in the decision indicates any control by the Secretary of the Interior over the income from the lease or its royalties or its operations. Neither does anything in the opinion indicate that the Secretary of the Interior had the sole right, as in the case at bar, to determine whether or not the lease had been breached. In other words, no Departmental Lease was involved and the Indians themselves were free to declare the lease breached without being required to have this determined by the Secretary of the Interior as is the case here. Neither was there in the *Sadler* case any applicable requirement of law or regulations that the matters involved be first submitted to administrative determination by the Secretary. See Sec. 221.66 of Title 30, Code of Federal Regulations—Mineral Resources Chapter II.

Choctaw and Chickasaw Nations v. *Seitz* (10th Cir., 1951), 193 F.2d 456 (Pet. Br. 10, Am. Br. 4), was an action brought by the two tribes (Five Civilized Tribes) to recover possession and establish title to their lands in Oklahoma.

The United States Supreme Court cases are likewise clearly distinguishable. *Heckman* v. *United States*, 224 U.S. 413, 56 L.Ed. 820 (Pet. Br. 8, 10, Am. Br. 4), was an action by the United States for members of the Five Civilized Tribes (Cherokees) to recover and quiet title to Cherokee allotments which had been conveyed by void deeds by the Indians. The dictum in that case, to which reference is frequently made, is limited to the right of "an allottee" (of the Five Civilized Tribes) to "enforce his right to an interest in the tribal or other property." See the statement of this distinction in *United States* v. *Waller*, 243 U.S. 452, 453, 61 L.Ed. 843, 847 (1917). *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 10, 63 L.Ed. 504 (Pet. Br. 10), was an action brought by the Pueblo to enjoin administrative officers of the United States from selling their land in disregard of their ownership. There was no semblance of an agreed or a provided restriction against the Indians in this type of case such as a Departmental Lease would be. *Felix* v. *Patrick*, 145 U.S. 317, 36 L.Ed. 719 (Pet. Br. 10) was an action by heirs of a half-breed Indian to recover land asserted to be held in trust on account of fraud perpetrated upon an Indian ancestor of plaintiffs by means of which fraud the alleged "Trustee" took the land in his own name instead of taking it for the Indian. The land, if taken in the Indian's name, would not have been restricted against sale in the hands of the Indian, and there was actually no question in the case of the right to institute and maintain the action since the

Federal Government had received no interest, control or supervision thereover. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 47 L.Ed. 299 (Pet. Br. 10), was a suit by authorized representatives of Indian Tribes against the Secretary of the Interior of the United States to abrogate a treaty with the United States as not having been fairly arrived at or properly executed. This case is obviously not in point. *Creek Nation* v. *United States*, 318 U.S. 629, 87 L.Ed. 1046 (Pet. Br. 10), was merely a suit by Indian Tribes against the United States, filed under specific statutory authority, for damages for failure to "keep the peace" under existing treaties. Its lack of relevance here is immediately apparent. *United States* v. *Candelaria*, 271 U.S. 432, 70 L.Ed. 1023 (Pet. Br. 10), was an action by the United States to quiet title to lands belonging to the Pueblo. A previous action had been brought by the Pueblo to establish and quiet its title to these lands against which there was no restriction nor was there a contractual obligation forbidding the institution and maintenance of the suit.

The citation of *Scott* (154 U.S. 34), *Virginia* (100 U.S. 339) and *New York Times* (376 U.S. 254) on page 12 of Petitioners' Brief would seem to be absolute but unintended support for Respondent's contention, subsequently advanced herein, that there is really nothing here for this Court to review since Respondent was denied equal protection of the law when the Supreme Court of Oklahoma refused to dismiss plaintiffs' appeal to that court. Neither of the above cited cases supports plaintiffs' claims here asserted for in the case at bar neither the trial court nor the Supreme Court of Oklahoma based or rested its decision upon any state statute or rule of state court and certainly not one

or more which are inconsistent with the Federal Constitution.

The terms and provisions of the General Allotment Act, as amended 25 U.S.C. 331 *et seq.*, 396 *et seq.*) referred to by the Solicitor General (Am. Br. 2-3) do not support Petitioners but on the contrary furnish statutory support for differentiation between the principles controlling the case at bar and the case assumed by the Solicitor General and Petitioners.

They also serve to emphasize the difference between the Congressional intent with respect to anti-trust, civil rights and military privilege cases and a case where the suit is to recover "royalties" due to the Secretary under a Departmental Lease on lands of Comanches held "in trust" by the United States. "Double-exposure" is expressly permitted and even directed by statutes involved in the cases (Am. Br. 5-6) exemplified by *United States* v. *Borden Co.* (anti-trust), 347 U.S. 514 (1954); *California* v. *Buzard* (military privilege), 382 U.S. 386 (1966), and *United States* v. *Arlington County* (military privilege), 326 F.2d 929 (4th Cir., 1964). They emphasize as well the difference between this suit and a suit to recover possession of, quiet title to or make secure an interest in the land itself or actual damage thereto.

The distinction lies in this: While the special statutes providing for private anti-trust suits, private civil rights suits and private military personnel suits expressly spell out that concurrent remedies are available to the citizens and the Government, and while this is also provided for in case of necessary action to protect the land of the Indian and possession and title thereto, such is obviously the opposite

result of express statutes relating to income receivable by virtue of contract over which the Secretary is expressly given by statute (as long as restrictions are not removed) exclusive control, including right of determination of amount, right of receipt and right of disposition (25 U.S.C. 396).

The decision in *Skokomish Indian Tribe* v. *France* (9th Cir., 1959), 269 F.2d 555, cited by the Solicitor General at pages 2, 4 and 6 of his Brief, is no more apposite. That was a suit by a tribe under a treaty to quiet title to lands set aside for it under that treaty and an executive order. This is vastly different from the case at bar as above established. Even so, the tenor of the whole opinion is in no wise contrary to Respondent's position here but rather tends to favor it.

Other cases relied upon by the Solicitor General, also cited by Petitioners, have been treated of above.

Proposition Two

Even assuming, *arguendo*, that this action could be properly instituted and maintained by the plaintiffs, the allegations of the Petition, including the express language of the lease which is attached to and made a part of the Petition do not assert liability of the defendant for the relief sought or any other relief obtainable by plaintiffs.

As to this point, it will be made clear by a reading of the Petition, the lease attached and the Rules and Regulations above referred to, that essential allegations to state a cause of action are missing from the Petition. For instance, there is no allegation of a specific violation of the rules and regulations of the Secretary of the Interior or that what was

done by the defendant was not strictly in compliance with supervisory directions and/or acquiescence by the superior authority, to-wit, the Supervisor of the lease designated by the Secretary of the Interior for such authority and such purpose. There is no allegation of application to the Secretary (or his designees) and his arbitrary or fraudulent refusal to hear or decide or to grant relief. Neither is there any allegation to challenge or negate the obvious view of the Secretary of the Interior that neither the lease nor the regulations "have been violated." This finding and satisfaction are necessarily established by the absence of action by the Secretary, under the duty imposed upon him and the exclusive authority given him by Title 25, Section 172.23 above quoted, to cancel this lease if there has been a "violation" of the lease or regulations. It must be presumed, in the absence of specific and express allegations to the contrary, that the Secretary of the Interior through his designated Supervisor performed his full duty and adequately supervised the operation of this lease and the production of oil therefrom in the interest of the lessors and that the rights of the lessors were adequately and properly safeguarded in the course of these operations by the Supervisor.

In *Bonds* v. *Sherburne Merc. Co.* (9th Cir., 1948), 169 F.2d 433, *cert. den.* 335 U.S. 899, 93 L.Ed. 434, a situation, similar to that here, involved Indian lands and official action by the Department of the Interior. There the Court said with respect to the designated officials:

> "it is presumed that they performed their official duties and that the Secretary of the Interior had found to his satisfaction"

the facts necessary to support his action or inaction.

The following federal and Oklahoma cases also announce and apply the same rule under and to many and varied issues and circumstances: *U. S. ex rel Harris* v. *Ragen* (7th Cir., 1949), 177 F.2d 303; *Laughlin* v. *Cummins* (C.A., D.C., 1939), 105 F.2d 71; *Shafer* v. *U. S.* (4th Cir., 1956), 229 F.2d 124, *cert. den.* 351 U.S. 931; *U. S. Hoffman Mach. Corp.* v. *Lauchli* (8th Cir., 1945), 150 F.2d 301; *Hicks* v. *Sanders,* 132 Okla. 242, 269 Pac. 297 (1928); *Southwestern Surety Ins. Co.* v. *Davis,* 53 Okla. 332, 156 Pac. 213 (1916); *Bonapart* v. *Nelson,* 142 Okla. 54, 285 Pac. 100 (1929).

Therefore, it must be presumed, in the absence of express allegation to the contrary, that the Supervisor found that under the particular circumstances there was no basis for demanding the royalties here sued for, such as: (1) that there was no market for the gas; (2) that the gas vented was "beneficially consumed"; (3) that the only alternative was to flare the gas and produce the oil and receive the oil royalties rather than to shut the oil production down and see adjoining lease production drain the oil from the Aitson Lease, all the while receiving no oil royalty from oil produced; and (4) that the vented casinghead gas was used by lessee in the production of oil and thus royalty free. It must be presumed that all of the factors were weighed and that it was determined that the only way to produce the oil in accordance with the terms of the lease was for Skelly to flare the casinghead gas and thus "use" the casinghead gas in the course of its operations in the production of oil. See lease paragraph 3(c) where it is agreed that:

> "* * * oil, and/or gas used by the lessee for development and operation purposes on said lease * * * shall be 'royalty free'."

If it be presumed, as it must be, that the Secretary and his Supervisor and his superior and the Commissioner of Indian Affairs did their duty, there would seem to be no question but that authorization to flare the casinghead gas *royalty free,* in order to get the oil, has been received by the lessee from the only power which could refuse such authorization. Also, under such presumption every fact, every demand, every equity, every circumstance has been considered, weighed and given effect by the Secretary. No intervention or substitution has been sought by the United States. Thus, going even beyond presumption, it is established that the United States officials did their duty and decided that there was no just cause for demand on the defendant for the alleged "royalty" sought to be recovered.

Once the Secretary has acted (either to do something affirmatively or to waive something or to do nothing about a known course of action) neither his acts nor waiver nor inaction is controllable by the courts unless and until it is shown that *he was called on in proper manner* to act and either did so or refused to do so *arbitrarily* or *fraudulently.* No predicate for this has been laid here and there is no such charge.

The decision in *United States* v. *Barnsdall Oil Co.* (10th Cir., 1942), 127 F.2d 1019, is strongly indicative of the power and authority of the Secretary of the Interior in prescribing the terms of the lease and in exercising discretion as to operations. The case stands for the proposition that the lessee will be fully protected (even in a suit by the Government itself) where it has followed and abided by rulings, decisions and supervision by the Department. This is an important case.

To the same effect is the decision in *United States* v. *Ahtanum Irrigation District* (9th Cir., 1956), 236 F.2d 321, where the Court held:

> "The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indian's rights, his lack of bargaining skill or determination may add up to an abuse of power but do not negative it or make his act ultra vires."

The act of the Secretary was held valid and binding.

In the case of *Diehl* v. *Phillips Petroleum Company* (Okla. 1962), 376 P.2d 203, the Supreme Court of Oklahoma squarely held that in all cases of leases executed under authority of federal statutes and regulations of the Secretary of the Interior such regulations must control where applicable; that the Court must take judicial notice of the federal statutes and the regulations of the Secretary applicable to the lease and that if it appears from either the lease or the regualtions that they cover the particular matter in litigation there is not room for or possibility of applying to the situation a side or collateral contract and that the contract must be disregarded and the regulations applied. In that case the Supreme Court held that where the regulations of the Secretary of the Interior contemplated that the lessee would have a right to lay and maintain service lines, rods and pipes there could be no recovery by the plaintiffs of damages for the laying and maintenance of these lines, rods and pipes even though a side or collateral contract between the parties would otherwise have required the paying of such damages.

It may be argued here that certain acts of the lessee have themselves amounted to technical violations of the

lease, and the Rules and Regulations. Such is not so, but assuming technical violations by lessee, it is clear that the Secretary has the right to (1) construe them as non-violative, to (2) find them justified, to (3) excuse them under the circumstances, and to (4) waive the violations in order to secure greater benefits.

Proposition Three

Plaintiffs have not exhausted their administrative remedy and prior thereto could not have their claim adjudicated in this Court.

As indicated by the lease and all the Rules and Regulations above quoted, the lessor Indians have had at all times a complete and comprehensive administrative remedy within the Department. The nature and course of such a remedy is fairly illustrated by the recitals in the opinion of the Court in *California Oil Co.* v. *Seaton, Secretary of the Interior* (D.C., Cal., 1960), 187 F.Supp. 445, *aff'd* 296 F.2d 384.

Sec. 172.23 of Title 25 and Sec. 221.66 of Title 30, above referred to and quoted, of the Rules and Regulations of the Secretary of the Interior makes this unmistakable and expressly clear. In the latter it is provided, *inter alia*:

> "An appeal from any order issued under authority of the regulations in this part may be filed as hereinafter set forth in this section. * * * An appeal to the Director may be taken from any order of the supervisor * * *. An appeal from any decision of the Director may be taken to the Secretary * * *. With regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director."

Nothing is more fundamental nor better established than that a litigant must exhaust his available administrative remedies before seeking judicial relief. This is well established by decisions of both state and federal courts.

In *Speaker* v. *Board of County Commissioners* (Okla. 1957), 312 P.2d 438, it is stated and held that where an administrative remedy is provided by law, relief must be sought from the administrative body, and such remedy must be exhausted *before the courts will act,* and the exhaustion of the administrative remedy is a jurisdictional prerequisite for resort to the courts. See also: *Sanders* v. *Oklahoma Employment Securities Commission,* 200 Okla. 366, 195 P.2d 272 (1948); *Constantin* v. *Martin* (C.A., Okla. 1954), 216 F.2d 312; *Furrow & Co.* v. *American Airlines* (D.C., Okla., 1952), 102 F.Supp. 808.

Plaintiffs have made no move to exercise their administrative remedy. For this reason alone, even assuming (which we continue to deny) that plaintiffs otherwise would have had standing in court, the demurrer was good and must have been sustained and the action dismissed.

Proposition Four

Correction here of a constitutional error by the Supreme Court of Oklahoma against the Respondent contrary to the Fourteenth Amendment guaranteeing due process and equal protection of the law renders the judgment of the District Court of Oklahoma County, Oklahoma, unassailable.

A basic fundamental precept of appellate court practice is that an appellee may, without cross appeal, show that errors were committed against him below which when corrected will require affirmance. *United States* v. *American*

Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087 (1924); *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191, 81 L.Ed. 593 (1937); *Commercial National Bank in Shreveport* v. *Parsons* (5th Cir., 1944), 144 F.2d 231. See also: *Silber* v. *United States*, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). There is a plethora of state Supreme Court decisions to this effect, among which are those of the Supreme Court of Oklahoma itself, such as: *American National Bank of Oklahoma City* v. *Ardmoreite Publishing Co.*, 123 Okla. 225, 253 Pac. 81 (1927); *Gilchrist* v. *Lowry*, 195 Okla. 537, 159 P.2d 261 (1945). Upon this principle, Respondent earnestly presents and supports the above stated proposition upon the basis of the following facts.

The Oklahoma Legislature in 1963 enacted into law, accepted by the Supreme Court of Oklahoma (App. 53-61) as binding upon it, a statute (H.B. No. 562, Oklahoma Session Laws 1963, p. 326, 12 O.S.A. 1963 Supp. 651) amending 12 O.S.A. 651 and reading in part:

> "A new trial is a re-examination in the same court of an issue of fact, or of law, either or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court."

By the Constitution of Oklahoma (Art. 5, Sec. 58, Art. 6, Sec. 11—App. 55) this statute, carrying the emergency clause, became effective on the 13th day of June, 1963, *more than three months before* the judgment of the District Court (App. 55, 56-60) in favor of this Respondent was rendered and entered on September 20, 1963. No motion for new trial was filed by plaintiffs, these Petitioners. When the appeal was lodged in the Supreme Court of Oklahoma (App. 48), the defendant in error, Respondent

here, filed its Motion to Dismiss the Appeal (App. 50) upon the jurisdictional ground of fatal failure to file a motion for new trial as a necessary predicate for the appeal. Involving, as it did, a question of jurisdiction, it was really a matter which the Court would have been required to raise and decide *sua sponte*. The Supreme Court of Oklahoma denied the motion, though it held expressly, in substance and by essential implication (App. 53-61, 394 P.2d 515, July, 1964), that: (1) jurisdiction to entertain an appeal is governed by the law in force and effect at the time the judgment sought to be reviewed was rendered (App. 55); (2) the statute requiring a motion for new trial was in force when the judgment was rendered on September 20, 1963 (App. 46, 51, 55) and was thus by its terms applicable to this judgment; (3) a motion for new trial was mandatory and a condition precedent to jurisdiction to review (App. 57-60); and (4) the duty of the Supreme Court of Oklahoma is to apply the statute (App. 58, 60, 61) to avoid destruction of "legislative intent." Thus, the Supreme Court of Oklahoma refused to apply the statute to this case (App. 60-61), postponing its operation (contrary to the Oklahoma Constitution), but to be applicable to all others under similar circumstances "after this opinion becomes final" (App. 60-61). An appeal was not then possible because defendant in error had not yet sustained any redressable legal injury as by reversal.

Thereafter and in numerous cases (40), the Oklahoma Supreme Court has consistently applied the statute and dismissed on jurisdictional grounds each appeal where motion for new trial was not filed, presented and denied. Exemplifying and illustrative of the many such decisions

and instances are: *Stokes* v. *State of Oklahoma*, 410 P.2d 59 (Okla., Oct., 1965); *Evans* v. *Wilkinson*, 419 P.2d 275 (Okla., May, 1966) and cases cited therein at page 276; and *St. Louis-San Francisco Ry. Co.* v. *Pinkston*, 420 P.2d 537 (Okla., Aug., 1966). See Shepard's Pacific Reporter Citator for many additional decisions.

Thus it appears indisputably that the statute enacted by the Oklahoma Legislature in a field admittedly lawfully pre-empted by it, was applicable to all *without classification or distinction.* Its denial of jurisdiction to the Supreme Court of Oklahoma where no motion for new trial is filed was without exception and without postponement as to operation and effectiveness. Such did not clothe the judiciary with power to extend, to make exceptions or classification *or to do otherwise than to enforce it as to everyone.* All this is patently clear from the very Supreme Court opinion (App. 53-61) arbitrarily refusing to apply the statute to protect this respondent's right to insist that the appeal be dismissed, but saying it must be subsequently applied to protect all others *under exactly similar circumstances.* This was followed by uniform instances of such actual, unbending and effective application to all such others, there citing as compelling the very statute here and there relied on and the opinion of the court previously refusing to apply it for Skelly's protection. And this was without supervention of law or fact. This is thus made not one law for all but was made one law for Skelly Oil Company and a different law for all others (who were exactly the same) as promulgated and enforced by an agency of the State of Oklahoma and thus by that State.

It is clear that this denied equal protection of the law and due process to Respondent. To this Court which has been, for at least the past decade, most vitally concerned with guarantees of rights under the Fourteenth Amendment, it would appear to be "carrying coals to Newcastle" to cite authority. Reference, however, is again made to the cases cited at page 12 of Petitioners' Brief. The point is thus submitted.

If, as a matter of constitutional right, this Respondent's motion to dismiss should have been sustained by the Supreme Court of Oklahoma and this right be now adjudicated and acclaimed, there is nothing here for review. In any event, this affords another reason why Petitioners must be relegated to their administrative remedy.

VI. CONCLUSION

1. It is respectfully submitted by the Respondent that upon the merits of the controversy as presented to it by the appeal of the Petitioners herein, the decision of the Supreme Court of Oklahoma is correct and is in line with authoritative Congressional enactments, Rules and Regulations properly adopted and enforced, the contract between Skelly Oil Company and the lessors including the United States, consistent with the Constitution of the United States, federal statutes, the Constitution of Oklahoma and its statutes and authoritative precedent of long standing and should be in all things affirmed.

2. It is also respectfully submitted that violation of the Federal Constitution by the Supreme Court of Oklahoma operating to the prejudice of this Respondent in denying to

it equal protection of the laws and in placing it in a position where its property may be thus taken without due process of law must be corrected in and by this Court and that if, as and when so corrected, one or the other of the following alternatives should be adopted by this Court:

(a) Writ of Certiorari heretofore issued by this Court to the Supreme Court of Oklahoma should be recalled, cancelled, set aside and withdrawn and the decision of the Supreme Court of Oklahoma be permitted to become final; or

(b) This proceeding should be dismissed upon the basis of a Writ of Certiorari improperly granted; or

(c) If remand be considered necessary, the Supreme Court of Oklahoma should be directed upon such remand to dismiss the appeal of the Petitioners here, plaintiffs in error there, allowing the judgment of the trial court in favor of this Respondent to become, be and remain final.

Respectfully,

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December, 1967

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 65

FRANK POAFPYBITTY, CARL POAFPYBITTY, THOMPSON POAFPYBITTY, LOUISE POAFPYBITTY, and LAVERNE AITSON,
Petitioners,

VERSUS

SKELLY OIL COMPANY,
Respondent.

REPLY BRIEF OF PETITIONERS

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January, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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THE OPINION AND DECISION OF THE OKLAHOMA SUPREME COURT

In *Oklahoma Tax Commission, et al.* v. *McInnis, District Judge,* 409 P.2d 355 (Dec. 22, 1965), the Oklahoma Supreme Court held as follows:

> "2. In this jurisdiction, under 12 O.S. 1961, Sec. 977, a syllabus of the Oklahoma Supreme Court should be confined to the points of law arising from the facts in the case; and the reasoning of the court and the facts as disclosed in the body of an opinion will be considered by this court in arriving at a correct interpretation of the law as announced in the syllabus."

The Syllabus of the Oklahoma Supreme Court in the decision herein, is as follows (A. 61, 62):

"Syllabus

"1. The rules and regulations made by the Secretary of the Interior, pursuant to the terms of a Departmental Oil and Gas Lease covering restricted Indian lands, have the force and effect of law, and the courts of Oklahoma take judicial notice of the same.

"2. Where the lessee of a departmental oil and gas lease covering restricted Indian lands does not violate any of the directions of the Secretary of the Interior or his subordinate officers in the operation of such lease made pursuant to the terms of the lease or the valid rules and regulations made by the Secretary of the Interior, such lessee is not liable in damages for the manner it has operated said lease in a suit by the restricted Indian lessors."

The opinion of the Oklahoma Court herein adopted by eight (8) Justices and being an integral part of the decision, states, in part, to-wit (A. 65 and 69):

"The defendant argues the case under four propositions, but we believe its first proposition is decisive in its favor, which is that under the express terms of the lease and the regulations of the Secretary of the Interior made pursuant to law and which must be read into the lease, the plaintiffs are precluded from suing or recovering in this action." (A. 65)

"* * * In paragraph 6 of the lease, it is provided 'that after the restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.' We think, under the maxim '*expressio unius est exclusio alterius*', this provision deprives the lessors of the right to prosecute a suit for breach of the lease contract until the restrictions are removed, and there is no allegation in the petition that the restrictions have been removed." (A. 69)

It can be seen that the Oklahoma Supreme Court decided this case upon the *sole ground* that by reason of the Federal restrictions involved *petitioners are deprived of the right to prosecute a suit for breach of the lease contract until the restrictions are removed.* We assert such decision is erroneous and unsound, and should be reversed.

Respondent argues improper venue herein under Oklahoma law, and asserts that the Oklahoma Supreme Court *could* have affirmed the judgment of the trial court on such ground, and asks this Court to construe Oklahoma law as to venue, and affirm the decision herein on that ground, notwithstanding the fact such decision is based entirely upon construction of Federal law. The gist of respondent's argument is the general rule that an appellate court, upon appeal from a judgment of a trial court, will generally affirm the judgment of the trial court if same is correct upon any legal basis even though the trial court actually predicated its judgment upon an erroneous or unsound basis.

We submit that is no merit to this argument herein as (1) The decision herein complained of is a state appellate court decision unequivocally based upon an erroneous and unsound construction of Federal law; (2) That construction of Oklahoma law as to venue of actions in Oklahoma State Courts is a question for decision of the Oklahoma Supreme Court alone, and petitioners have been deprived of their right to have such question determined by the Oklahoma Supreme Court herein by the decision herein which erroneously determined that petitioners are deprived of the right to bring this lawsuit anywhere in Oklahoma *by reason of Federal restrictions.* (3) The rule

advanced by respondent has no application to a decision and opinion of an appellate court of last resort.

Under Oklahoma law we contend this action is a transitory action and not a local action, and the venue is properly laid in Oklahoma County where the service agent of Skelly Oil Company resides and was served with process. *Sohio Petroleum Co.* v. *Brannon* (Okla.), 189 P.2d 193; 63 A.L.R. 2d 480 n. Oil and gas in its natural state is not susceptible of ownership in place apart from the land in which found, but is "personal property" when produced and reduced to possession. *Replogle* v. *Indian Territory Illuminating Oil Co.* (Okla.), 143 P.2d 1002. *Cf. Rich* v. *Doneghy,* 71 Okla. 204, 177 Pac. 86, 3 A.L.R. 352. Title 12 O.S.A. 131, as amended in 1957, in our opinion, would not apply to this action, and it is our further opinion the Oklahoma Supreme Court would follow the *Sohio Petroleum* case, *supra,* in determining venue, if it were not for the erroneous construction of Federal law such court made in the decision herein.

In *Perkins* v. *Benquet Consolidated Mining Company,* 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413, the Supreme Court of Ohio had held that the doing of business in Ohio did not make a foreign corporation subject to service of summons in an action *in personam* based upon a cause of action not arising in Ohio. This was expressed in a syllabus. An opinion was promulgated in conjunction with the syllabus, and the author of the opinion based the decision unequivocally on the ground that under the then existing decisions of the United States Supreme Court a contrary holding would violate due process. It was not there disclosed whether other members of the Ohio Court shared the view

of the author of the opinion. In *Perkins* this Court said (342 U.S. at p. 443, 96 L.Ed. at p. 491):

> "The only opinion accompanying the syllabus of the court below places the concurrence of its author unequivocally upon the ground that the Due Process Clause of the Fourteenth Amendment *prohibits* the Ohio courts from exercising jurisdiction over the respondent corporation in this proceeding. That opinion is an official part of the report of the case. The report, however, does not disclose to what extent, if any, the other members of the court may have shared the view expressed in that opinion. Accordingly, for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so."

The State Court decision and opinion herein presents a stronger case than *Perkins*. Herein, the syllabus, and the opinion of a majority of eight (8) justices of the court, unequivocally rests the decision in this case solely upon its construction of Federal restrictions and regulations, which petitioners, and the United States as *Amicus Curiae*, aver is an erroneous and unsound construction of Federal Indian restrictions, Federal regulations and Federal law. *Cf. State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511, 83 L.Ed. 950; *Whitney* v. *California*, 274 U.S. 357, 360-361, 71 L.Ed. at p. 1099; *Manhatten Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134, 58 L.Ed. at p. 1253.

RESPONDENT'S CLAIM OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW

Respondent claims that the decision of the Oklahoma Supreme Court, in this case, denying the motion of respondent Skelly Oil Company to dismiss the appeal of petitioners herein from the decision of the trial court to the Supreme Court of Oklahoma (A. 53-61, 394 P.2d 515) deprived respondent Skelly Oil Company of its rights under the Fourteenth Amendment of Due Process and equal protection of the law.

We submit that this claim of respondent is not timely made. Respondent did not object nor appeal from the order denying its motion to dismiss appeal. After the denial of its motion to dismiss, the Oklahoma Supreme Court rendered the decision herein. In respondent's brief in opposition to *certiorari* no such claim as now presented is made. We do not believe that respondents should be permitted to urge the correctness of this decision as written, and in the next breath say that the same court erroneously entertained jurisdiction in the case in which it obtained a favorable decision. *Cf. The Maria Martin* (*Martin* v. *Northern Transp. Co.*), 12 Wall. 31, 20 L.Ed. 251; *Morley Construction Co.* v. *Maryland C. Co.*, 300 U.S. 185 at p. 191, 192, 81 L.Ed. 593, at p. 598.

However, we do not believe the decision of the Oklahoma Supreme Court denying said motion to dismiss offended any rights of respondent under the Fourteenth Amendment.

We submit this Court has determined there is no merit to such an argument as is here made. In *Great Northern*

Railway Company v. *Sunburst Oil & Refining Company*, 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145, 85 A.L.R. 254, it was held that the highest court of a state in overruling an earlier decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether the new rule declared by it shall operate prospectively only, or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.

In the *Great Northern* case the Montana Court overruled a previous decision (*Doney* case), but also held such ruling would apply prospectively only, and adjudicated the rights of the parties under the rule of the *Doney* case. The question there was the same as the one here raised. In *Great Northern*, it is said (287 U.S. 364, 77 L.Ed. 366, 85 A.L.R. 260):

> "* * * This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> "We think the Federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L.ed. 382, 44 S.Ct. 197, supra), that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted. * * *"

The decision of the Oklahoma Supreme Court, in making its ruling prospectively only, followed the *Great Northern case* (A. 61).

REPLY TO RESPONDENT'S ARGUMENT SUPPORTING STATE COURT DECISION

We submit that the authorities cited by respondent pertaining to restricted Indians and restricted Indian lands are clearly distinguishable in principle. The language employed in any of the cited cases should be read in the light of the particular question before the Court for decision.

Seber v. *Spring Oil Co.* (D.C. Okla. 1940), 33 F.Supp. 805, involved the issued of whether a Departmental Oil and Gas Lease, on land of an allottee of the Five Civilized Tribes, and duly approved by the Secretary of the Interior, covered and included "casinghead gas." It was claimed that the lease itself *did not grant the lessee the right and privilege to produce "casinghead gas."* The Court held that the lease there involved, which expressly incorporated Federal regulations as a part thereof, did cover, include and grant to the lessee the right to produce "casinghead gas." When the Court so construed the lease the lawsuit was concluded, as there was no allegation, nor claim made, that the lessee had not paid royalties for "casinghead gas" produced to the Secretary of the Interior in accordance with the terms of the lease. No question was even raised therein as to the right of the Indian allottee to sue.

Town of Okemah v. *United States,* 140 F.2d 963 (10th C.A.) and *Minnesota* v. *United States,* 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235, are cited. These two cases we submit, are clearly distinguishable as they were both proceedings

in Eminent Domain where it was sought to condemn lands belonging to Indians, the title to which was held in trust by the United States. The effect of a judgment in those cases would have been an alienation of the lands there involved.

Hansen v. *Hoffman,* 113 F.2d 780 (10th C.A.) was a case involving the will of an Indian and we submit the question here involved was not in any way before the Court in *Hansen.*[1]

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[1] Judge Phillips, of the Court of Appeals of the Tenth Circuit, was the author of the opinions in *Town of Okemah* v. *United States, supra,* and *Hansen* v. *Hoffman, supra.* Judge Phillips also was the author of the opinion of that Court in *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F.2d 456, 459, 460, where it is said:

> "/7/ Thus, it will be seen that the decisions in Heckman v. United States, supra, Lane v. Pueblo of Santa Rosa, supra, and United States v. Candelaria, supra, clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo.
>
> "We find it difficult to believe that the Supreme Court, in recognizing the right of restricted Indians, Indian tribes and pueblos to maintain an action with respect to their lands, was dealing only with the capacity to maintain the action. Clearly, its language had reference to suits to which the United States was not a party. We cannot think the Supreme Court would have dealt so extensively with the mere capacity of the restricted Indians, the tribes, and pueblos to sue and defend in respect to their lands, if it regarded the United States as an indispensable party to the action. A holding that restricted Indians, tribes, or pueblos have capacity to prosecute or defend an action with respect to their lands would be of no avail to them, if the United States is an indispensable party to such an action, since the joinder of the United States cannot be compelled. We think the inference must be drawn that the Supreme Court recognized the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party."

Butler v. *Denton*, 57 F.Supp. 656 (D.C. Okla. 1944), was a dispute between Indian heirs over funds in the custody of the Secretary of the Interior (Superintendent of Five Civilized Tribes). The United States removed the case to the Federal Court and intervened and claimed the funds should remain in custody of the Superintendent for the benefit of certain full blood Indian legatees of deceased beneficiaries of a previously approved agreement settling a previous dispute between heirs of the deceased original full blood allottee. The Court upheld the position of the Government. We say there is nothing in the *Butler* case contrary to petitioners' claims herein.

United States v. *Fitzgerald*, 201 Fed. 295 (C.A. 8, 1912), holds that the United States may sue for the wrongful taking of personal property from an Indian which personal property was held by the Indian subject to the control and management of an Indian agent, and that the admission of Indians to citizenship did not necessarily withdraw the Indian's property from the control and management of the United States or relieve the United States from its duty to protect the Indian's property from force, fraud and wrongs, against such Indian. We have continuously stated that the United States could have brought the instant case, or could have intervened herein. There is nothing in *Fitzgerald* holding contrary to our position herein.

United States v. *Hellard*, 322 U.S. 363, 88 L.Ed. 1326, involved the question of whether full blood Indians of the Five Civilized Tribes may be *divested of title to restricted land* by a sale in partition proceedings to which the United States is not a party. We submit *Hellard* turned on the fact that a partition proceeding and sale was an *alienation of*

restricted land. The effect of a partition would be the same as a condemnation proceeding. The distinction here is that there is no alienation of the rights or lands of petitioners involved in the present suit. We ask the right to obtain additional benefits, not to sell or dispose of property. And we ask that the benefits from this lawsuit be paid to the United States for the benefit of petitioners (A. 42). The United States was the petitioner in *United States* v. *Hellard, supra*, and therein it is said (322 U.S. at p. 365, 88 L.Ed. at p. 1329):

> "* * * Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under § 1 of the Act of June 14, 1918. *Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination.* * * *" (Emphasis ours.)

We submit that *Hellard* gives support to our position herein. We do not believe any of the many cases cited by respondent afford any authority contrary to the position of petitioners, which position is supported by the United States as *Amicus Curiae.*

NO ADMINISTRATIVE REMEDY EXISTS AS TO THIS SUIT FOR DAMAGES

Nothing in the terms of the Departmental Oil and Gas Lease, nor Federal statutes, nor Federal regulations make provision for any administrative remedy for money damages due by the lessee (respondent) for breach of the express and implied covenants of the lease. It is correct that Federal regulations provide that under certain conditions the Secretary is empowered to *cancel* the lease. It may well

be that as a condition precedent to *cancellation* the administrative remedy therefor should be first exhausted. But here we do not seek cancellation of the lease. We ask money damages from respondent lessee and submit there is no other way for money damages for such breach to be obtained than by suit in court or voluntary payment thereof by lessee. Clearly the Federal regulations do not provide any administrative remedy therefor. The United States, who administers the property involved under Federal regulations, has stated neither the Federal regulations nor the lease terms preclude maintenance of this action by petitioners (*Amicus Curiae* Memorandum, pp. 6-7).

CONCLUSION

The decision and opinion of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

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January, 1968

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1967.

Frank P. Poafpybitty et al., Petitioners, *v.* Skelly Oil Company.	On Writ of Certiorari to the Supreme Court of Oklahoma.

[March 18, 1968.]

Mr. Chief Justice Warren delivered the opinion of of Court.

The question presented is whether petitioners, who are Comanche Indians, have standing to sue under an oil and gas lease approved by the Department of the Interior for use on land held by Indians under trust patents issued by the United States.

In 1947 the Acting Commissioner of Indian Affairs approved an oil and gas lease which petitioners had executed to respondent, Skelly Oil Company, on the form prescribed by the Department of the Interior. The first well was drilled in 1956, and seven producing wells were soon completed. In 1961 petitioners retained counsel with the approval of the Department of the Interior [1] and brought this damage action against respondent in the District Court of Oklahoma County, Oklahoma, alleging that respondent had breached the express and implied covenants in the lease and had thereby impaired

[1] The Area Director of the Bureau of Indian Affairs approved a contract between petitioners and an attorney for legal services to be rendered in connection with this litigation. The Area Director has been delegated the authority to approve the employment of attorneys for individual Indians who may be compensated on a *quantum meruit* basis from restricted trust funds. Section 269 of Order 551 of the Commissioner of Indian Affairs, 16 Fed. Reg. 2939 (1951), as amended, 22 Fed. Reg. 6066 (1957).

petitioners' royalties. Respondent notified the Department of the Interior and the Bureau of Indian Affairs of the litigation, but the Government made no attempt to intervene in the proceedings. The petition filed in the District Court asserted that respondent had permitted natural gas being produced from the wells to escape despite the fact that there was a pipeline less than a mile from the land.[2] Petitioners claimed that respondent ignored their request that the gas be marketed and continued to allow the gas to be wasted in violation of the terms of the lease.[3] The District Court sustained respondent's demurrer and dismissed the petition. The Supreme Court of Oklahoma affirmed on the ground that petitioners were precluded from suing by the provisions of the lease and by the regulations promulgated by the Secretary of the Interior to control oil and gas leases on restricted Indian land.[4] We granted certiorari, 389 U. S.

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[2] The petition also alleged that the waste of natural gas violated § 86.3 of the Oklahoma Oil and Gas Conservation Act. Okla. Stat. Ann., Tit. 52, § 86.3 (1941). In response to a motion to require petitioners to elect between or state separately a cause of action under the lease and one based on tort, the District Court, with the approval of the parties, struck the alleged violation of the conservation statute from the petition. After petitioners announced that the petition then stated only one cause of action which sought recovery for the breach of the lease, the District Court denied the motion.

[3] The lease provides:

"3. In consideration of the foregoing, the lessee hereby agrees:

. . . . . .

"(f) Diligence, prevention of waste.—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practices, having due regard for the prevention of waste of oil or gas developed on the land . . . ."

See 30 CFR §§ 221.18, 221.35 (1966).

[4] The opinion of the Oklahoma Supreme Court is not reported.

814 (1967), to determine whether the federal restrictions imposed on the Indians prevented them from vindicating their rights. In our view, the decision below unduly restricts the right of the Indians to seek judicial relief for a claimed injury to their interests under the oil and gas lease.

The trust patents to the land in question were issued to petitioners under the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. §§ 331–358 (1964), which provided that individual Indians were to be allotted land on their reservations [5] and that the United States was to hold the land "in trust for the sole use and benefit of the Indian" allottee for a 25-year period. 25 U. S. C. § 348 (1964). During the trust period, which has been repeatedly extended,[6] restricted Indian land may be sold or leased only with the consent of the Secretary of the Interior. In our view, these restrictions on the Indian's control of his land are mere incidents of the promises made by the United States in various treaties to protect Indian land and have no effect on the Indian's capacity to institute the court action necessary to protect his property. In order to fulfill these national promises to safeguard Indian land and at the same time "to prepare the Indians to take their place as independent, qualified members of the modern body politic," *Board of County Comm'rs* v. *Seber*, 318 U. S. 705, 715 (1943), the allotment system was created with the Indians receiving ownership rights in the land while the United States retained the power to scrutinize the various transactions by which the Indian might be sepa-

[5] Indians are expressly authorized to institute proceedings against the United States to establish their right to an allotment. 25 U. S. C. § 345 (1964).

[6] See note following 25 U. S. C. § 348 (1964). And see 25 U. S. C. § 462 (1964), which provides: "The existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof are extended and continued until otherwise directed by Congress."

rated from that property. *Squire* v. *Capoeman*, 351 U. S. 1, 9 (1956). See, *e. g.*, 18 Cong. Rec. 190–192 (1886). This dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment. The obligation and power of the United States to institute such litigation to aid the Indian in the protection of his rights in his allotment was recognized in *United States* v. *Rickert*, 188 U. S. 432 (1903); *Heckman* v. *United States*, 224 U. S. 413 (1912), and *United States* v. *Candelaria*, 271 U. S. 432 (1926). See generally Federal Indian Law 326–341 (1958). In *Heckman*, an action brought by the United States to set aside an improper conveyance of restricted land, this Court realized that the allotment system created interests in both the Indian and the United States.[7] "A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." 224 U. S., at 438. In holding that the United States could sue to protect the allotment, the Court indicated that the Government could either bring the necessary suit itself or allow the litigation to be prosecuted by the Indian.

> "In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department. The allottee may be permitted to bring his own action, or if so brought the United States may aid him in its conduct . . . . And when the United States itself undertakes to represent the allottees of lands under

[7] "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman* v. *United States*, 224 U. S. 413, 437 (1912), quoted with approval in *United States* v. *Hellard*, 322 U. S. 363, 366 (1944).

> restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property." *Id.*, at 446.

Later decisions followed the implications of *Heckman* and held that the right of the United States to institute a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf. In *Creek Nation* v. *United States*, 318 U. S. 629 (1943), this Court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though the tribes could not sue the United States for its failure to collect the sums allegedly due.[8] The Court stated, "That the United States also had a power to sue did not necessarily preclude the tribes from bringing their own actions." *Id.*, at 640. Accord, *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110 (1919); *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555 (C. A. 9th Cir. 1959). Nor does the existence of the Government's power to sue affect the rights of the individual Indian.[9] "A restricted Indian is not without capacity to sue or to be sued with respect to his affairs, including his restricted property. . . . Both the Act of April 12, 1926 and the decision . . . in *Heckman* v. *United States* . . . recognize capacity in a restricted Indian to sue or defend actions in his own behalf subject only to the right of the Government to inter-

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[8] Indians of course are now authorized to bring claims against the United States. See Indian Claims Commission Act, 60 Stat. 1049 (1946); 25 U. S. C. §§ 70–70w (1964). For claims arising after August 13, 1946, see 28 U. S. C. § 1505 (1964), conferring jurisdiction on the Court of Claims.

[9] "[T]he rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands are clearly recognized, although the United States might not be bound by a judgment in such an action to which it was not a party." Federal Indian Law 336 (1958).

vene." *Sadler* v. *Public Nat'l Bank & Trust Co.*, 172 F. 2d 870, 874 (C. A. 10th Cir. 1949). And in *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F. 2d 456, 459 (C. A. 10th Cir. 1951), the court stated that *Heckman, supra, Lane, supra,* and *Candelaria, supra,* "clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands, although the United States would not be bound by the judgment in such an action, to which it was not a party, brought by the restricted Indian or an Indian tribe or pueblo." In *Brown* v. *Anderson*, 61 Okla. 136, 160 P. 724 (1916), the Oklahoma Supreme Court itself held that *Heckman* had "fully answered" the argument that only the United States as guardian of the Indian could bring a suit to cancel an improper conveyance of a restricted Indian allotment. The court held:

> "Osborne Anderson, the defendant in error, although a full-blood Indian, was a citizen of the United States and of the state of Oklahoma. No good reason appears why he should be denied the privilege of appealing to the courts of the state the same as any other citizen to enforce his right to property, even though such property be land upon which restrictions against alienation have been imposed by an act of Congress." 61 Okla., at 138–139, 160 P., at 726.

See *Bell* v. *Fitzpatrick*, 53 Okla. 574, 157 P. 334 (1916); L. Mills, Oklahoma Indian Land Laws § 328 (1924). We agree that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of their rights.

There remains the question whether the terms of the oil and gas lease or the regulations promulgated by the Secretary of the Interior to govern those leases prevent the Indians from seeking judicial relief for an alleged impairment of their interests under the lease. Respondent argues that the Secretary has such complete control over the lease that only he can institute the necessary court action.

The leasing of allotted land for mining purposes "by said allottee" is expressly authorized by 25 U. S. C. § 396 (1964). Although the approval of the Secretary is required, he is not the lessor and he cannot grant the lease on his own authority.[10] The Secretary is authorized to promulgate regulations controlling the operation and development of the lease and to issue necessary written instructions to the lessee. *Ibid.* See generally 25 CFR §§ 172.1–172.33 (1967); 30 CFR §§ 221.1–221.67 (1966). The lessee is required to furnish a surety bond, in an amount satisfactory to the Secretary, guaranteeing compliance with the terms of the lease, which incorporate the regulations of the Secretary. 25 U. S. C. § 396c (1964). The Secretary has the power to inspect the leased premises and the books and records of the lessee. 25 CFR § 172.25 (1967). The Secretary also has the power to impose such restrictions as to the time for the drilling of wells or the production from any well "as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interests of the Indian lessor." 25 CFR § 172.24 (1967). The lessee must furnish the Secretary with a monthly report disclosing all operations conducted on the lease, 30 CFR §§ 221.60–221.65 (1966), and must pay

[10] A proviso to § 396 does give the Secretary the power to offer leases on his own if the allottee is deceased and the heirs have not been determined or cannot be found. 25 U. S. C. § 396 (1964).

the royalties to the Secretary who deposits them to the credit of the Indian lessor. 25 CFR §§ 172.14, 172.16 (1967). The lessee agrees to drill wells which the Secretary determines are necessary to protect the leased land from drainage by another well on adjoining property. 30 CFR § 221.21 (1966). Finally, the lessee is obligated to prevent the waste of oil and gas and agrees to pay the Indian lessor the full value of all gas wasted, unless the Secretary determines at the request of the lessee that the waste was sanctioned by state and federal law. 30 CFR §§ 221.18, 221.35 (1966).

While the United States has exercised its supervisory authority over oil and gas leases in considerable detail, we find nothing in this regulatory scheme which would preclude petitioners from seeking judicial relief for an alleged violation of the lease. If the Government does determine that there has been waste in violation of a lease, it will of course satisfy its trust obligations by filing the necessary court action. However, there is nothing in the lease or regulations requiring the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own. The existence of the power of the United States to sue for a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the

income value of the property." H. R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that the Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.[11]

The regulations do empower the Secretary to cancel a lease "for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or any regulations heretofore or hereafter prescribed have been violated." 25 CFR § 172.23 (1967). However, there is no justification for concluding that the severe sanction of cancellation of the lease is the only relief for all breaches of the lease terms or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement by the payment of damages and not by the cancellation of a basically satisfactory lease.

Nor is the capacity of the Indian defeated by § 6 of the lease, which provides that the Secretary may cancel the lease "before restrictions are removed," and concludes, "Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of the contract by the lessee." [12] There is no warrant for implying by neg-

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[11] The Memorandum for the United States as *amicus curiae* states, at p. 7:

"In sum, respondent's contention that, until the trusteeship is ended, the Indian landowners are disabled from maintaining suit for breach of a lease they have granted of their own property is unsupported in the governing statutes, the implementing regulations, or the terms of the lease."

[12] Section 6 of the lease provides:

"6. Cancellation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed,

ative inference from this proviso a denial of all remedies otherwise available to the Indian prior to the removal of the federal restrictions on his power to alienate the land. Section 6 merely provides that when the federal restrictions on alienation are terminated, the federal supervision over the lease will likewise come to an end, without impairing the continuing rights of the Indian. Compare 25 CFR § 172.28 (1967).[13]

Respondent's argument that the judgment in its favor should be sustained on available adequate state procedural grounds is untenable. Since the Oklahoma Supreme Court's decision rested solely on federal grounds, that court must have either rejected or failed to reach the asserted state grounds. Furthermore, we intimate no view on the merits of the case. If the lessee has conformed to all of the requirements of the federal regulations and has not breached any of the terms of the lease, the suit may fail. We merely hold that the Indian lessors have the capacity to maintain an action seeking damages for the alleged breach of the oil and gas lease.

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the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided,* That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee."

[13] The regulation dealing with the removal of restrictions avoids the danger of a negative inference by stating: "Oil and gas leases . . . on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by the Department, shall, after such removal of restrictions against alienation, be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease . . . ." 25 CFR § 172.28 (1967).

Accordingly, the judgment of the Supreme Court of Oklahoma is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.